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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 215

E. G. PALMER, PETITIONER,

vs.

MRS. AGNES B. McGRAWL BENDER, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,912)

(36,912)

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[Caption omitted]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION.

No. 1904 Law.

E. G. PALMER,

versus

JACOB O. BENDER, Individually and as Collector of Internal Revenue for the District of Louisiana.

PETITION.

To the Honorable Ben C. Dawkins, Judge of the United States District Court for the Western District of Louisiana.

The petition of E. G. Palmer, a resident and citizen of Shreveport, Louisiana, respectfully represents:

1.

That Jacob O. Bender, Collector of Internal Revenue of the United States for the District of Louisiana, and a resident of New Orleans, Louisiana, is justly and legally indebted unto your petitioner in the full sum of Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,937.80) Dollars, with interest at six per cent per annum from January 4, 1927, until paid, for this, to-wit:

2.

That on or about March 13, 1922, the petitioner duly filed with the defendant his individual income tax return for the year 1921, and duly paid the tax shown to be due thereon.

3.

That on or about February 20, 1923, the petitioner duly filed with the defendant his individual income tax return for the year 1922 and duly paid the tax shown to be due thereon.

4.

That petitioner is, and was at all times mentioned herein, the husband of Mabel Mitchell Palmer,
2 and being a resident of the State of Louisiana, and under the regime of the community of acquets and gains, filed the aforesaid income tax return for one-half of the income so accruing to such community for the years in question on a community property basis.

5.

That this controversy arises out of matters in connection with the interests owned by petitioner in the partnership known as "J. E. Smitherman, Special Account," and the George O. Baird partnership, and involves income taxes for the years 1921 and 1922, all of which is specifically set forth hereafter.

6.

That early in the year 1919, J. E. Smitherman and his associates, of whom petitioner was one, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed that if the said citizens would lease 15,000 acres of designated land in the vicinity of Haynesville to Smitherman and his associates, that the latter would pay a bonus of 50c per acre for such leases and drill a test well on the property within eight months after the execution and delivery of the leases.

7.

That during the year 1919, a partnership under the firm name of "J. E. Smitherman, Special Account," was formed, composed of the following partners, whose respective proportionate interest are expressed in the percentages set opposite their names:

	Per cent.
J. Y. Snyder	5
J. E. Smitherman	15-5/6
E. G. Palmer	15-5/6
Mrs. J. K. Findley	15-5/6
C. D. Keen	1-3/16
B. W. Marston	1-3/16
M. M. Morelock	2-3/8
Mrs. W. L. Beene	1-3/16
L. A. Beene	1-3/16
L. T. Waller	2-3/8
S. J. Beene	2-3/8
L. L. Beene	2-3/8
S. L. Beene	2-3/8
Baucum Brothers	3-9/16
Waller Bros. & Co.	4-3/4
H. A. Longino & D. D. Goode	2-3/8
Claude Beene & C. E. Miller	3-9/16
J. C. McEachern	2-3/8
G. Y. Harris	2-3/8
R. G. Smitherman, Jr. ...	2-3/8
J. R. Bevill	1-3/16
A. H. Southern	3-9/16
J. C. Sherman	4-3/4
Total	100%

8.

The partnership acquired 26,000 acres of leases in the vicinity of Haynesville, Louisiana, in the name of J. E. Smitherman, in whose name all subsequent contracts in reference thereto were made.

9.

When the leases were acquired, the nearest production to the land leased was the Homer Field in Claiborne Parish, Louisiana, about 13 miles distant. Several wells were drilled on the leased premises in 1919, 1920 and 1921, but all were dry except that drilled in 1921.

10.

On March 30, 1921, the discovery well (known as Anna Taylor No. 2) was completed by the partnership as a producing oil well, with an estimated daily production of 7500 barrels. It was located 580 feet North and 330 feet West of the center of the Northwest quarter of Section Fourteen (14), Township Twenty-three (23) North, Range Eight (8) West, and discovery area was located on four leases to the partnership, namely, Anna Taylor et als, H. P. Camp and G. W. Taylor.

11.

On April 23, 1921, and within thirty days after the discovery well was brought in, the partnership subleased to the Ohio Oil Company 120 acres of the 160 acres on which the well was located. On the execution of the document evidencing such sub-lease, the said sub-lessee paid to the partnership a bonus or advanced royalty of Three million ($3,000,000) Dol-

lars, and agreed to pay an additional bonus or advanced royalty of One million ($1,000,00) Dollars out of ½ of the first oil produced and saved from the premises sub-leased, and an excess or over-riding royalty of one-eighth of the oil and gas produced and saved from the leased premises and reserved to sub-lessor the right to join with the sub-lessee in the manufacture of casing head gasoline from the wells drilled on said premises. The reversion of leases to the sub-lessor in the event of abandonment by the sub-lessee was stipulated in a separate letter.

12.

Concurrently, approximately 17,000 acres, not including the discovery 160 acres, was sub-leased to the Ohio Oil Company.

13.

On April 21, 1921, and within thirty days after the discovery, the partnership sub-leased to the Gilliland Oil Company forty acres on which the discovery well was located for a payment in the nature of a bonus or advanced royalty of approximately Six hundred thousand ($600,000) Dollars, and at the same time entered into a "working agreement" with said company.

14.

That it was the intention of the partnership and of the Ohio Oil Company and the Gilliland Oil Company by said transfers to sub-lease the acreage covered.

15.

The partnership received therefor from the subleases aforesaid, the following:

5 Bonus or advanced royalty.

Sub-lease to Ohio Oil Co. (120 acres)	$3,000,000	
Sub-lease to Ohio Oil Co. (right to receive out ½ first oil, reduced to present worth)	900,000	
Sub-lease to Gilliland Oil Co. (40 acres)	585,750	
	$4,485,750	
Out of Oil.		
1/8 royalty in Ohio Oil Co. sub-lease, reduced to present worth	$1,300,000	
7/16 interest in Gilliland Oil Co. sub-leased, reduced to present worth	585,750	
	$1,885,750	
Aggregate		$6,371,500

16.

The fair value of the property on which the discovery well was brought in, at date of discovery or within thirty days thereafter, was represented by the cash and its equivalent received by the partnership and the value of the interests retained by the partnership aggregating Six million, three hundred seventy-one thousand, five hundred ($6,371,500) Dollars, which was the fair market value of the proprety on the date of discovery and within thirty days thereafter.

17.

The royalties expected to be received, without reducing to present worth, are as follows:

On sub-lease to Ohio Oil Co. $1,625,000
On sub-lease to Gilliland Oil Co. 732,187

18.

The cost of the well being approximately Twenty-five thousand ($25,000) Dollars and the fair market value of the property at date of discovery or within thirty days thereafter being Six million, three hundred seventy-one thousand, five hundred ($6,371,500) Dollars, the said fair market value at that time was utterly disproportionate to cost.

6

19.

The total area, up to the date of discovery, being developed solely by the partnership, was not acquired as a result of the purchase of a proven tract or lease.

20.

The said partnership of "J. E. Smitherman, Special Account", was sub-lessor under conveyance to the Ohio Oil Company and the Gilliland Oil Company, and as such was entitled to deductions for depletion based upon discovery value on the basic date, on bonuses, advanced royalties or other sums received as sub-lessor.

21.

That on or about May 2nd, 1922, the said partnership filed its return of income for the calendar year 1921.

22.

That on or about March 14, 1923, the said partnership filed its return of income for the calendar year 1922.

23.

That on the return so filed by the said partnership for the years 1921 and 1922, in determining the net income to be accounted for by the partners, there was deducted from the gross income, among other items, the bonus moneys or advanced royalties paid by the said Ohio Oil Company and the Gilliland Oil Company during said years on account of the said above described sub-leases.

24.

That said deductions were proper and legal, and authorized by the law and the regulations of the Treasury Department issued by the Commissioner of Internal Revenue in pursuance of authority therein granted.

25.

That subsequent to the filing of the aforesaid partnership returns, the Commissioner of Internal Revenue upon an audit of same, disallowed as deductions the amounts of Four million, twenty-three
7 thousand, nine hundred forty-eight and 56/-100 ($4,023,948.56) Dollars and Five hundred seventy-six thousand, fifty-one and 44/100 ($576,-051.44) Dollars, representing depletion sustained by bonuses, or advanced royalties for the years 1921 and 1922, respectively, thereby increasing the net income of the partnership to be accounted for by members.

That said disallowance was based on the theory that the conveyances made by the partnership to the Ohio Oil Company and the Gilliland Oil Company, as aforesaid, constituted sales and not sub-leases.

26.

That, therefore, the action of the Commissioner of Internal Revenue, in disallowing such deductions, on

the theory that the instruments in question were sales and not sub-leases, is wholly illegal, arbitrary and void under the Revenue laws in force during the taxable periods aforesaid.

27.

In the year 1919 George O. Baird, acting for himself and associates, acquired a certain oil and gas lease on a then unproven area consisting of about 51 acres and known as the "Langston Lease", located in Claiborne Parish, State of Louisiana. The lease was taken for the use and benefit of the following named persons, (one of whom is the plaintiff), in the proportion here set out, to-wit:

1. The George O. Baird partnership composed of George O. Baird, E. G. Palmer, R. T. Layne, J. A. Thigpen and S. L. Herold, equally, an undivided one-half interest; or an undivided one-tenth interest each.

2. Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., an undivided one-fourth interest; or an undivided one-eighth interest each.

3. Mrs. J. A. Thigpen and Mrs. S. L. Herold, an undivided one-fourth interest; or an undivided one-eighth interest each.

28.

On March 20, 1920, R. T. Layne died leaving as his sole and surviving heir, his wife, Mrs. R. T. Layne,
8 who became a member of the George O. Baird partnership by virtue of the inheritance of one-half of her husband's estate, and under the community property law of Louisiana as an owner of one-half of the estate.

29.

On December 30, 1920, George O. Baird, E. G. Palmer, J. A. Thigpen and S. L. Herold purchased from Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., the whole of their interest in the aforesaid Langston lease, with an equal one-fourth each.

30.

Baird and his associates, above named, drilled a well on the said unproven tract, which resulted in the discovery of oil on August 23rd, 1919. Their rights as discoverers to a revaluation, based on discovery under the provisions of the Revenue Laws, were duly asserted and have been formally recognized by the Commissioner; the discovery revaluation having been fixed by the Commissioner at One million, eleven thousand, three hundred ninety-seven and 67/100 ($1,011,397.67) Dollars, and the unit for the depletion purposes having been definitely found and adjudged by the Commissioner to be $1.3859 per barrel.

31.

On December 10, 1919, George O. Baird with the consent of and representing all his associates, as well as himself, entered into a contract with J. Rogers Flannery. Under this contract, Flannery paid on December 10, 1919, as therein recited, the sum of Five hundred thousand ($500,000) Dollars. Part of said sum was used by Baird to pay certain obligations of Flannery's; the balance after such payments, amounting to Three hundred and fifty thousand ($350,000) Dollars, being the net sum paid on that date by Flannery under the terms of the contract. As authorized by the agreement, Baird retained for his security the possession of the property and continued its operations.

9

32.

Flannery failed to make any payments other than his original cash payment, or otherwise to comply with his obligation under the contract. Accordingly, on January 11, 1921, Baird instituted a suit in the Third Judicial District Court of Louisiana, Claiborne Parish, demanding a resolution of the contract for non-performance of its conditions. November 9th, 1921, there was final judgment, decreeing a restoration of the status quo before the contract, including the return by Baird to Flannery of the $350,000.00 which he, Baird, had received from Flannery on December 10, 1919. Flannery had, subsequent to the suit but prior to judgment, assigned all his rights under the aforesaid contract to one John Munhall, Jr., so that the judgment as finally rendered was against Munhall, as assignee of Flannery.

33.

On November 16, 1921, George O. Baird, acting for himself and his then co-owners, made an agreement with the Gulf Refining Company of Louisiana, which was embodied in a written contract, which contract stated "that the Gulf Refining Company of Louisiana loaned to said George O. Baird $350,000.00 on the sole security of the said lease, without any personal liability." The said sum of $350,000.00 was to be repaid within a period of thirty months out of 60% of the oil produced from said property after the delivery of the one-eighth royalty to the lessors, and one twenty-fourth to the said Baird. However, the contract provided that the sum of $325,000.00 was to be paid to Baird, notwithstanding the mortgage and pledge of the said property as security for the above loan of $350,000.00 out of 60% of the oil produced from said property. The said sum of $325,000.00 to be paid before the expiration of thirty months.

10

34.

The said sum of $350,000.00 loaned by the Gulf Refining Company of Louisiana to the taxpayers was paid directly by the lender to Munhall, Flannery's assignee, in compliance with the terms of the above mentioned judgment.

35.

Baird executed and placed in escrow with the trustees the final conveyance to be delivered to the Gulf Refining Company only if, when and as it should thereafter have performed the condition recited in the written instrument. This conveyance remained in the hands of the escrow agents throughout the remainder of the year 1921, through all of 1922, and until some time in 1927, when it was delivered by the escrow agent to the Gulf Refining Company of Louisiana.

36.

Timely partnership returns for the years 1921 and 1922 were made by the George O. Baird partnership to the Internal Revenue Collector for the District of Louisiana.

37.

Petitioner returned as income in 1921 his proper proportion of the sixty per cent of seven-eighths of the aforesaid production, deducting therefrom depletion based upon the discovery revaluation previously allowed by the Commissioner of Internal Revenue.

38.

Petitioner correctly reported as income for 1922, his proportion of the sixty per cent of the seven-eighths

of the oil production and its value, deducting therefrom discovery depletion as theretofore determined and adjudged by the Commissioner of Internal Revenue.

11

39.

That despite the facts above set out, the Commissioner of Internal Revenue assessed additional income taxes against petitioner for the years 1921 and 1922 as a result of his disallowance of such depletion and of his holding that the $350,000.00 borrowed from the Gulf Refining Company of Louisiana as set forth in the contract with that company, was income in the year 1921, and that no account was to be taken of the repayment of the same sum of $350,000.00 to Flannery's assignee, Munhall, made a condition of the judgment by which the property was repossessed.

40.

That the said deductions claimed by petitioner on account of his interest in the George O. Baird partnership were proper and legal, and authorized by the law and the regulations of the Treasury Department issued by the Commissioner of Internal Revenue in pursuance to authority therein granted.

41.

That the disallowance of said deductions by the Commissioner of Internal Revenue, and his holding respecting income from the George O. Baird partnership, is wholly illegal, arbitrary and void under the Revenue laws in force during the taxable period aforesaid, because:

(a) The agreement with Gulf Refining Company of Louisiana was a contract of loan with respect to the $350,000.00 received thereunder, which was not taxable income for the year 1921.

(b) The contract did not immediately convey title, but at most only granted a right to demand a conveyance in the future.

(c) In the alternative, in the event the Court should hold the contract to have been an executed contract under which title immediately passed, then the contract under the law of Louisiana could not have imported more than a sub-lease.

(d) The sum of $350,000.00 paid to Flannery's assignee under the judgment resolving the sale to Flannery, was a condition precedent to repossession of the property.

12

42.

That such action of the Commissioner of Internal Revenue with respect to the income of "J. E. Smitherman, Special Account," and the George O. Baird partnership, for the years 1921 and 1922, was reflected in the individual income tax returns of the petitioner with the result that the said Commissioner, on or about December 21st, 1926, assessed against the petitioner the sum of One hundred twenty-nine thousand, one hundred thirty-eight and 75/100 ($129,138.75) Dollars, and Thirty-eight thousand, seventy-one and 17/100 ($38,071.17) Dollars, representing additional income taxes alleged to be due for the years 1921 and 1922.

43.

That in the month of December, 1926, the said Jacob O. Bender, as such Collector of Internal Revenue aforesaid, made demand upon your petitioner for the payment of One Hundred sixty-seven thousand, two hundred nine and 92/100 ($167,209.92) Dollars, with

interest amounting to Forty-five thousand, seven hundred twenty-seven and 88/100 ($45,727.88) Dollars, representing additional 1921 and 1922 income taxes assessed against him by the Commissioner of Internal Revenue, by letter dated on or about December 21st, 1926, as follows:

1921	$129,138.75
1922	38,071.17
Totaling	$167,209.92
and interest on 1921 tax of	$37,080.51
and 1922 tax of	8,647.37
Totaling	$45,727.88

the aggregate of taxes so assessed and interest being Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,937.80) Dollars.

13

44.

That under the duress of said assessment and in order to prevent distraint of petitioner's property, he paid said sum under protest to the defendant on January 4, 1927.

45.

That the petitioner duly filed with the defendant a claim for refund of the taxes and interest so paid, on May 4, 1928, and that said claim was complete in all respects and was in the form and manner as prescribed by the law and regulations governing the filing of claim for refund. That said claim was rejected by the Commissioner of Internal Revenue within six months thereafter and notice of rejection forwarded to petitioner.

That the petitioner later amended said claim by the filing of a supplemental claim for refund on June 19, 1928, and no decision thereon has been rendered by the Commissioner of Internal Revenue within six months from the date of filing thereof.

46.

That said assessment by the Commissioner of Internal Revenue and exaction of said amount by the defendant was wholly illegal, arbitrary and void under the revenue laws in force during the time herein mentioned and without warrant in law or fact and that the defendant, though same has been demanded of him, refused and still refuses to refund to the petitioner the sum of Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,937.80) Dollars, illegally collected by him from your petitioner.

47.

That your petitioner is entitled to six per cent per annum interest on the amounts so illegally collected from him, from January 4, 1927, until said amounts are repaid and refunded to him.

14 Wherefore, petitioner prays that Jacob O. Bender, Collector of Internal Revenue for the District of Louisiana, be duly cited to answer hereto; that, after due proceedings had, there be judgment in favor of your petitioner and against the said defendant in the full sum of Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,-937.80) Dollars, with six per cent per annum interest on said amount from January 4, 1927, until paid.

Petitioner further prays for all orders necessary, for costs, and general and equitable relief.

FRED R. ANGEVINE,
SMITHERMAN, TUCKER & MASON,
Attorneys for Petitioner.

15 State of Louisiana,
Parish of Caddo.

Before me, the undersigned Notary Public, duly commissioned and qualified in and for said Parish and State, personally came and appeared E. G. Palmer, of Shreveport, Louisiana, to me well known, who being by me first duly sworn, deposes and says:

That he is the plaintiff in the above and foregoing petition; that he has read the said petition; and that the statements and allegations contained in said petition are true and correct to the best of his knowledge and belief.

E. G. PALMER.

Sworn to and subscribed before me, said Notary Public, at my office in the City of Shreveport, Louisiana, on this the 20th day of December, 1929.

JOHN H. TUCKER,
(Seal) Notary Public.

Filed December 20th, 1929.

16 Citation and Marshal's Return thereon, omitted from the printed record.

* * * * * * * *

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18 ANSWER.

(Title Omitted.)

To the Honorable Benjamin C. Dawkins, Judge of the United States District Court for the Western District of Louisiana.

The defendant, for answer to the petition herein, alleges and shows to the Court as follows:

1.

Paragraph 1 of the petition is denied.

2.

Paragraph 2 of the petition is admitted.

3.

Paragraph 3 of the petition is admitted.

4.

Paragraph 4 of the petition is admitted, except that it is denied petitioner's income was correctly reported in said returns.

5.

Paragraph 5 of the petition is admitted.

6.

Paragraph 6 of the petition is admitted.

7.

Paragraph 7 of the petition is admitted.

19 8.

Paragraph 8 of the petition is admitted.

9.

Paragraph 9 of the petition is admitted.

10.

Paragraph 10 of the petition is admitted.

11.

Paragraph 11 of the petition is denied.

12.

Paragraph 12 of the petition is denied.

13.

Paragraph 13 of the petition is denied.

14.

Paragraph 14 of the petition is denied.

15.

Paragraph 15 of the petition is denied.

16.

Paragraph 16 of the petition is denied.

17.

Paragraph 17 of the petition is denied.

18.

Answering Paragraph 18 of the petition, defendant denies the allegations contained therein, except that it is admitted that the value of the property at date of discovery or within thirty days thereafter was disproportionate to the cost.

19.

Paragraph 19 of the petition is denied.

20.

Paragraph 20 of the petition is denied.

21.

Paragraph 21 of the petition is admitted.

22.

Paragraph 22 of the petition is admitted.

20 23.

Paragraph 23 of the petition is denied.

24.

Paragraph 24 of the petition is denied.

25.

Answering Paragraph 25 of the petition, defendant admits that the Commissioner of Internal Revenue disallowed as deductions from income, all claimed depletion alleged to have been sustained in connection with the alleged subleases on the theory that the claimed subleases constituted sales or assignments and not subleases. All other allegations contained in said Paragraph are denied.

26.

Paragraph 26 of the petition is denied.

27.

Paragraph 27 of the petition is admitted.

28.

Answering Paragraph 28 of the petition, defendant admits that R. T. Layne died on March 20, 1920, leaving as his sole surviving heir, his wife, Mrs. R. T. Layne, and denies all other allegations contained in said Paragraph.

29.

Paragraph 29 of the petition is admitted.

30.

Paragraph 30 of the petition is admitted.

31.

Paragraph 31 of the petition is admitted.

32.

Answering Paragraph 32 of the petition, defendant admits that said Flannery failed to make any payment other than his original cash payment or otherwise to comply with his obligations under the contract. Defendant also admits that said Baird instituted a suit on January 11, 1921, in the Third Judicial District Court of Louisiana, demanding a resolution of the contract for non-performance of its conditions, and that a final judgment was entered on November 9, 1921. Defendant also admits that said
21 final judgment provided, among other things, that said Baird repay to said Flannery the sum of $350,000.00. Defendant also admits that said Flannery had subsequent to said suit, but prior to judgment, assigned all his rights under the aforesaid contract to one, John Munhall, Jr., so that the judg-

ment as finally rendered was against Munhall, as assignee of Flannery. Defendant denies all other allegatios contained in said Paragraph.

33.

Answering Paragraph 33 of the petition, defendant admits that said George O. Baird on November 16, 1921, made an agreement in writing with the Gulf Refining Company of Louisiana. Defendant admits that it is stated in said agreement that "The Gulf Refining Company of Louisiana has this day loaned to the said George O. Baird the sum of $350,000.00 on the sole security of the said lease without any personal liability." Defendant denies that the said sum of $350,000.00 was to be repaid within a period of thirty months, as alleged in said Paragraph. Defendant admits that said contract provided that the sum of $325,000.00 was to be paid to Baird before the expiration of thirty months. Defendant denies all other allegations contained in said Paragraph and further denies that said contract constituted a mortgage or pledge as security for any loan or that a loan in any amount was made by the said Gulf Refining Company of Louisiana to the said George O. Baird.

34.

Answering Paragraph 34 of the petition, defendant admits that a sum of $350,000.00, payable under the said contract by the Gulf Refining Company of Louisiana, was paid directly by said company to Munhall, Flannery's assignee, and denies all other allegations contained in said Paragraph.

35.

Answering Paragraph 35 of the petition, defendant admits that said Baird executed and placed in escrow

with the trustees, a conveyance to be de-
22 livered to the Gulf Refining Company of Louisiana, if and when it should thereafter have performed the conditions recited in the said written contract. With respect to the remaining allegations of Paragraph 35, defendant has no knowledge, information or belief sufficient to form an opinion regarding the same, and therefore, such allegations are denied.

36.

Paragraph 36 of the petition is admitted.

37.

Paragraph 37 of the petition is denied.

38.

Paragraph 38 of the petition is denied.

39.

Answering Paragraph 39 of the petition, defendant admits that the Commissioner of Internal Revenue made additional assessments of taxes against the petitioner for the years 1921 and 1922, but denies that said additional assessments were based entirely upon the adjustments described in Paragraph 39.

40.

Paragraph 40 of the petition is denied.

41.

Paragraph 41 of the petition is denied.

42.

Answering Paragraph 42 of the petition, defendant admits that the action of the Commissioner with respect to the income of "J. E. Smitherman, Special Account" and "George O. Baird, Partnership" for the years 1921 and 1922 was reflected in the individual income tax returns of the petitioner. Defendant also admits that the Commissioner of Internal Revenue made additional assessments of income and profits taxes against the petitioner for the said years on the dates and in the amounts alleged. Defendant denies all other allegations contained in said Paragraph.

23

43.

Paragraph 43 of the petition is admitted.

44.

Defendant admits that said sums were paid under protest on January 4, 1927. Defendant denies, however, that said sums were paid under duress.

45.

Answering Paragraph 45 of the petition, defendant admits that petitioner filed claims for refund on May 4, 1928, of the taxes and interest so paid. Defendant also admits that petitioner filed further claims for refund on June 19, 1929, and that such further claims for refund filed on June 19, 1929, have not yet been rejected. Defendant denies all other allegations contained in said Paragraph.

46.

Paragraph 46 of the petition is denied.

47.

Paragraph 47 of the petition is denied.

Wherefore, defendant prays that said action be dismissed and for his costs incurred herein.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana,
J. FAIR HARDIN,
J. Fair Hardin,
Assistant United States Attorney for the Western District of Louisiana,
ELMER A. MOTTET,
Elmer A. Mottet,
Assistant United States Attorney for the Western District of Louisiana.

24

AFFIDAVIT.

State of Louisiana,
Parish of Caddo.

Before me, the undersigned authority personally came and appeared Philip H. Mecom, who on being sworn according to law, deposes and says: That he is the United States Attorney for the Western District of Louisiana and the attorney for the defendant in the above styled suit; that he has read the foregoing answer which was prepared on information furnished him by the General Counsel, Bureau of Internal Revenue, Washington, D. C., and that the facts therein stated are true and correct according to his information and belief.

PHILIP H. MECOM.

Sworn to and subscribed before me, on this February 10, 1930.

NELL ILLIEN,
(Seal) Notary Public.

I certify that I have mailed a copy hereof to opposing counsel. 2/10/30.

PHILIP H. MECOM,
United States Attorney.

Filed Feb. 12, 1930.

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25 STIPULATION TO WAIVE JURY.

(Title Omitted.)

It is hereby stipulated and agreed by and between the parties to the above entitled action that a jury be and the same is hereby waived, and that the case be tried by the Court without a jury.

FRED R. ANGEVINE,
JOHN H. TUCKER,
Attorneys for Plaintiff,
PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

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26 MOTION FOR JUDGMENT.

(Title Omitted.)

Comes the plaintiff, E. G. Palmer, through the undersigned counsel, and upon conclusion of all the evi-

dence moves the Court for a directed verdict or judgment in his favor and against the defendant, as prayed for in his petition.

FRED R. ANGEVINE,
JOHN H. TUCKER,
Attorneys for Petitioner.

Denied in part. See written opinion.
BEN C. D.

Filed July 16, 1930.

---

27 MOTION FOR JUDGMENT.

(Title Omitted.)

Now comes the defendant at the close of the evidence and moves the Court for judgment in his favor and for the dismissal of the petition filed herein and for grounds of his motion states:

1. There is no evidence to support a judgment in favor of plaintiff in any amount.

2. That the instruments in question, Exhibits, L, N, Q, R and Y, constituted sales or assignments and not subleases.

3. That the Baird partnership realized income in the year 1921 in an amount representing the difference between the cost of the property sold to Gulf Refining Co. and $350,000.00, the sum paid by said Company to Flannery's assigns for the benefit of the Baird partnership.

4. That the evidence does not show that plaintiff is entitled to any further deduction from gross income from either 1921 or 1922 on account of depletion.

PHILIP H. MECOM,
United States Attorney for the Western District of Louisiana,
E. O. HANSON,
Attorneys for Defendant.

Denied in part. See written opinion.
BEN C. D.

Filed May 26, 1930.

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28 PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Title Omitted.)

Now comes the plaintiff, E. G. Palmer, by his attorneys, John H. Tucker, Jr., and Fred R. Angevine, and considering the facts hereinafter set forth to be proved and deeming them material to the presentation of this case, requests the Court to specifically find the following facts and conclusions of law separately stated:

1. That E. G. Palmer, plaintiff, a resident of Shreveport, Louisiana, duly filed with Jacob O. Bender, defendant, Collector of Internal Revenue for the District of Louisiana, his income tax return for the year 1921. On March 13, 1922, and for the year 1922, on February 20, 1923; the returns being filed herein as Exhibits "T" and "U."

Granted.

2. That E. G. Palmer is, and was at all times mentioned in plaintiff's petition, the husband of Mabel Mitchell Palmer, and being a resident of the State of Louisiana, and under the community of acquets and filed said income tax returns for one-half of the income accruing to such community for the years in question on a community property basis.

Granted.

3. That this controversy arises out of matters in connection with the interests owned by petitioner in the partnership known as "J. E. Smitherman, Special Account," and the George O. Baird Partnership, and involves income taxes for the years 1921 and 1922, all of which is specifically set forth hereafter.

Granted.

29 Matters Arising out of the "J. E. Smitherman, Special Account" Partnership. (Par. 4 to 20 Inc.)

4. That early in the year 1919, J. E. Smitherman and his associates, of whom petitioner was one, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed that if the said citizens would lease 15,000 acres of designated land in the vicinity of Haynesville to Smitherman and his associates, that the latter would pay a bonus of 50c per acre for such leases and drill a test well on the property within eight months after the execution and delivery of the leases.

Granted.

5. That during the year 1919, a partnership under the firm name of "J. E. Smitherman, Special Account,"

was formed, composed of the following partners, whose respective proportionate interests are expressed in the percentages set opposite their names:

	Per Cent.
J. Y. Snyder	5
J. E. Smitherman	15-5/6
E. G. Palmer	15-5/6
Mrs. J. K. Findley	15-5/6
C. D. Keen	1-3/16
B. W. Marston	1-3/16
M. M. Morelock	2-3/8
Mrs. W. L. Beene	1-3/16
L. A. Beene	1-3/16
L. T. Waller	2-3/8
S. J. Beene	2-3/8
L. L. Beene	2-3/8
S. L. Beene	2-3/8
Baucum Brothers	2-9/16
Waller Bros. & Co.	4-3/4
H. A. Longino & D. D. Goode	2/38
Claude Beene & C. E. Miller	3-9/16
J. C. McEachern	2-3/8
G. Y. Harris	2-3/8
R. G. Smitherman, Jr.	2-3/8
J. R. Bevill	1-3/16
A. H. Southern	3-9/16
J. C. Sherman	4-3/4
Total	100%

Granted.

6. The partnership acquired 26,000 acres of leases in the vicinity of Haynesville, Louisiana, in the name of J. E. Smitherman, in whose name all subsequent contracts in reference thereto were made.

Granted.

7. When the leases were acquired, the nearest production to the land leased was the Homer Field in Claiborne Parish, Louisiana, about 13 miles distant. Several wells were drilled on the leased premises in 1919, 1920 and 1921, but all were dry except that drilled in 1921.

Granted.

8. On March 30, 1921, the discovery well (known as Anna Taylor No. 2) was completed by the partnership as a producing oil well, with an estimated daily production of 7500 barrels. It was located 580 feet North and 330 feet West of the center of the Northwest quarter of Section Fourteen (14), Township Twenty-three (23) North, Range Eight (8) West, and the discovery area was located on four leases to the partnership, namely, Anna Taylor et als, H. P. Camp and G. W. Taylor. These leases are shown as Exhibits "H," "I," "J" and "K."

Granted.

9. On April 23, 1921, and within 30 days after the discovery well was brought in, the partnership transferred to the Ohio Oil Company 120 acres of the 160 acres on which the well was located by the following instrument in writing (Exhibit N):

"State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me Sam W. Mason, a Notary Public duly commissioned and sworn in and for said Parish and State, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price here-

inafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled in the City of Findlay, County of Hancock, State of Ohio, herein appearing for the purpose of accepting this assignment through its agents and attorney in fact, O. D. Donnell, Vice President, duly authorized and empowered hereto by a resolution of the Board of Directors of said Company, a certified copy of which is attached hereto, and by reference made part hereof, the following described property situated in the Parish of Claiborne, State of Louisiana, and particularly described as follows, to-wit:

East half ($E\frac{1}{2}$) of Northwest quarter ($NW\frac{1}{4}$) and Southwest quarter ($SW\frac{1}{4}$) of Northwest quarter ($NW\frac{1}{4}$) of Section 14, Township 23 North, Range 8 West, containing one hundred twenty acres more or less.

To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigns.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of three million dollars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of the said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum

of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver unto said assignor, his heirs, executors and assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his heirs or assigns.

It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman, his heirs and assigns, shall share in the profits derived from the one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

The appearers further declared that it is agreed and understood by and between them that the deferred payments to be made out of the oil, as well as settlements for the one-eighth (1/8) excess royalty herein above stipulated, shall be made on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

In witness whereof, the said James E. Smitherman and the said The Ohio Oil Company, acting through its said agent and attorney in fact, have hereunto signed their names in the presence of me, Notary, and E. G. Palmer and Mrs. R. T. Layne, two competent

witnesses, at my office in the City of Shreveport, in said Parish and State on this 23rd day of April, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL CO.,
By O. D. DONNELL,
Vice-President.

Witnesses:
E. G. PALMER,
MRS. R. T. LAYNE.

SAM W. MASON,
Notary Public.

32

On the execution of which, the said Ohio Oil Company paid to the partnership a bonus or advanced royalty of Three Million ($3,000,000.00) Dollars, and agreed to pay an additional bonus or advanced royalty of One Million ($1,000,000.00) Dollars out of 1/2 of of the first oil produced and saved from the premises sub-leased, and an excess or overriding royalty of one-eighth of the oil and gas produced and saved from the leased premises and reserved to sub-lessor the right to join with the sub-lessee in the manufacture of casing head gasoline from the wells drilled on said premises, and in connection therewith agreed with the partnership as follows: (Exhibit O and P).

"Memorandum of Agreement, made and entered into this 12th day of July, 1921, by and between James E. Smitherman, and the Ohio Oil Company, an Ohio corporation, hereinafter referred to as the Ohio, Witnesseth:

Whereas: By the terms of certain assignments from James E. Smitherman to the Ohio Oil Company conveying to said Company certain interest in oil and gas lease in Claiborne Parish, State of Louisiana, and in the County of Columbia, State of Arkansas, said instruments of assignment being recorded in Book 45,

page 392, records of Columbia County, Arkansas, and in Book 28, page 15 to 25 inc., of the conveyance records of Claiborne Parish, La., the Ohio Oil Company agreed to pay over and deliver to the said Smitherman the equal one-eighth (1/8) part of all oil produced and saved from the premises so assigned. Now, therefore, this agreement to provide for gathering, storing and disposing of such one-eighth interest. In consideration of the sum of one dollar each to the other paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants herein contained it is agreed as follows:

First: The Ohio shall have control of said Smitherman one-eight interest, with the right to place in storage commingled with the Ohio's oil or any other oil that may be stored in such tanks from the Smitherman leases, for as long as it shall think wise, all or any part of said interest, and the right at any time to sell with the Ohio's portion of the oil, any part or all of such interest at the price the Ohio shall at the time be receiving for its oil run from the tank farm in the Haynesville, La., field, settlement for oil sold to be made on or before the 15th day of the month succeeding that in which the oil is so sold, such settlements to be made subject to any deductions that may be made by the Pipe Line Company at the time the oil is run.

In consideration whereof the Ohio agrees, upon the payment to it by said Smitherman of the sum of fifteen hundred dollars ($1,500.00) to convey to Smitherman an undivided one-eighth (1/8) part of the interest acquired by it in and to the following described land: The Northwest quarter (NW¼) and the Northwest quarter of the Southwest quarter (NW¼ of SW¼) less
15 acres off of the South side of said last de-
33 scribed tract, all in Section 13, Township 23 North, Range 8 West, Claiborne Parish, La.,

containing 185 acres, more or less, upon which are now being erected oil storage tanks, the Ohio reserving to itself however, the one one hundred and twenty-eighth (1/128) royalty interest acquired by it by deed of conveyance from Frank M. Taylor.

Second: It is further agreed that Smitherman shall have and own an undivided one-eighth interest in all tanks erected on said land upon the payment to the Ohio of an equal one-eighth of the cost of all such tanks now on said land or to be erected thereon, payment to be made promptly upon receipt of bills from the Ohio.

Third: The Ohio agrees further that it will construct the necessary gathering lines at its own expense, convey the oil to storage tanks, and market the Smitherman one-eighth interest for a consideration of eight cents (8¢) per barrel payable on or before the 15th day of month following that during which the oil is run into the storage tanks.

Fourth: It is agreed further that Smitherman shall pay to the Ohio the one-eighth part of any charge that may be made by the Louisiana and Northwest Railroad on account of the construction and maintenance of a railroad siding on said tank farm and now being used for the transportation of tank material.

Fifth: Smitherman agrees to join with the Ohio in the execution of any division orders required to accomplish the sale of all or any part of the oil produced from the lands described in the assignments above referred to.

Sixth: It is further understood that the Ohio shall not be responsible for the loss of any such oil so placed in storage, by reason of evaporation or fire, or otherwise,

except that if the Oil shall carry insurance on such oil Smitherman shall pay one-eighth of the cost of such insurance and be protected to the extent of his interest so insured.

In witness whereof the said James E. Smitherman has hereunto set his hand and the Ohio Oil Company has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereto affixed, the day and year first above written. This agreement shall be binding upon the heirs, successors and assigned of the parties hereon.

(Signed) JAMES E. SMITHERMAN.

Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Attest:

Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

34 State of Ohio,
County of Findlay.

Before me, the undersigned authority, personally came and appeared James E. Smitherman, of Shreveport, La., and the Ohio Oil Company appearing through J. C. Donnell, its President, and C. L. Fleming, its Secretary, who declared to me said Notary that they executed the above and foregoing agreement in writing for the purposes and considerations therein set forth and in the presence of the subscribing witnesses hereto.

In witness whereof, the said appearers have hereunto signed their names in the presence of me a Notary in the presence of two competent witnesses in my office in said County and State on the 12th day of July, 1921.

(Signed) JAMES E. SMITHERMAN,
THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Witnesses:
S. L. BEENE,
E. B. REDPATH,
W. R. HODGE, Notary Public.

My commission expires March 4, 1924."

"The Ohio Oil Co.

Shreveport, La., April 23, 1921.

Mr. J. E. Smitherman,
Shreveport, Louisiana.

Dear Sir:

With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North, Ranges 7 and 8 West, and in Twp. 23 North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender or cancel all or any part of any one or all of said leases then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to

you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors.

Yours very truly,
THE OHIO OIL COMPANY,
By J. K. KERR,
Vice-President."

JKK:C.

Granted.

34½ 10. On April 21, 1921, and within thirty days after the discovery, the partnership transferred to the Gilliland Oil Company forty acres on which the discovery well was located for a payment in the nature of a bonus or advanced royalty of approximately six hundred thousand ($600,000) Dollars, and at the same time entered into a "working agreement" with said company. The transfer and working agreement being as follows: (Exhibits L and M):

"State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me T. M. Milling, Notary Public in and for said Parish and State, duly commissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared, that for the consideration hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty, unto the Gilliland Oil Company, a Corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice-President, R. C. Gilliland, duly authorized hereto by

Resolution of the Board of Directors, of said corporation, a certified copy of which is attached hereto, its successors and assigns.

An undivided one-half interest in and to that certain mineral lease executed by Mrs. Annie Taylor et al on March 3rd, 1919, in favor of J. E. Smitherman, filed for record on the 8th day of March, 1919, and recorded on the 30th day of April, 1919, in Book 10, folio 35, Conveyance records of Claiborne Parish, Louisiana, in so far as same covers and effects the Northwest quarter of the Northwest quarter (NW¼ of NW¼) of Section Fourteen (14), Township Twenty-three (23) North of Range Eight (8) West, containing forty acres more or less,

Together with a like interest in the oil well thereon known as Taylor Number Two (2), with all machinery, appurtenances and attachments thereto belonging; Eight steel storage tanks having a total capacity of Seven thousand barrels together with the oil therein, and the oil in earthern storage heretofore produced by the well known as Taylor No. 2, whether situated on the above described property or not.

Also a like interest in and to the drilling well known as Taylor Number Four (4), subject however to the obligation of assignee to pay and discharge one-half of the cost and expenses of drilling said well, all situated in Claiborne Parish, Louisiana.

To have and to hold unto the said Purchasers, its successors and assigns, subject to the terms and conditions of said mineral leases.

The consideration for which this sale and assignment is made, is the sum and price of six hundred thou-

sand ($600,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, and full discharge and acquittance granted for same.

The same parties declared that it is understood between the parties to this agreement that all conditions between the parties hereto extend to their heirs, executors, administrators and assigns.

Thus done and passed at my office in said Parish of Caddo, in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this the 21st day of April, A. D. Nineteen Hundred and Twenty-one.

JAMES E. SMITHERMAN,
GILLIALND OIL CO.,
By R. C. GILLILAND, Vice-Pres.

Attest:
SAM W. MASON,
E. G. PALMER.

T. M. MILLING,
Notary Public in and for
Caddo Parish, Louisiana."

"Working Agreement.

State of Louisiana,
Parish of Caddo.

Know all men by these presents that this agreement is made and entered into by and between James E. Smitherman, married to Ina Thompson, a resident of Shreveport, said Parish and State, hereinafter designated as party of the first part, and the Gilliland Oil Company, a corporation organized under the laws of the State of Delaware, authorized to do business in the City of Shreveport, Caddo Parish, Louisiana, herein appearing through R. C. Gilliland, duly authorized and empowered hereto, all as will appear by resolution of

the Board of Directors of the said corporation, attached hereto and by reference made a party hereof, hereinafter called party of the second part,

Witnesseth:

That for and in consideration of the sum and price of Seven hundred and fifty thousand dollars ($750,000.00) to be paid in cash and property as hereinafter set forth, party of the first part binds and obligates himself to sell, assign and set over unto the party of the second part, and party of the second part agrees to buy, without warranty, but with full subrogation of all rights and actions of warranty, unto said party of the second part, its successors and assigns, and for the particular consideration set forth, the following described property, to-wit:

First: An undivided one-half interest in and to the mineral leases covering

Northwest quarter (NW¼) of Northwest quarter (NW¼) of Section Fourteen (14), Township 23 North Range 8 West, and the South half (S½) of Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section Eleven (11), Township 23 North, Range 8 West, Claiborne Parish, Louisiana,

together with the oil well thereon known as Taylor No. 2, and all drilling wells and equipment, tankage, derricks, etc., situated upon said lease, together with all the oil produced from said well known as Taylor No. 2, whether situated upon said property or not, for the consideration of the sum and price of Six hundred thousand dollars ($600,000.00).

Second: An undivided one-half interest in and to leases covering an amount of acreage checkerboarded

throughout grantor's leases known as Haynesville acreage and situated in Township 23 North, Ranges Six (6), Seven (7), and Eight (8) West, Claiborne Parish, Louisiana, and in Township 20 South, Range 19 West, Columbia County, Arkansas, equal to approximately one-eighth (1/8) of the acreage owned by the said party of the first part in each and every section in which he owns leases in the said area, the total amount of acreage owned by him being approximately Twenty thousand (20,000) acres and the amount which he is transferring an undivided one-half (½) interest herein being Twenty-five hundred (2500) acres, more or less, for and in consideration of the sum and price of One hundred and fifty thousand dollars ($150,000.00), the said acreage being more particularly described and set out on a map thereof, reference to which is hereby made, and the said party of the first part agrees to accept as a part of the consideration to be paid by party of the second part for the property as above stated, at a valuation of Two hundred and fifty thousand dollars ($250,000.00), an undivided one-half interest in and to party of the second part's Tank Farm situated at Minden, Louisiana, together with all the tanks thereon, loading racks, machinery, pump stations, spur tracks, right of way, and equipment, piping, attachments and appurtenances thereto belonging, except eight (8) tanks, at present partially filled with oil, together with the ground upon which said eight tanks stand; the number of tanks herein transferred being guaranteed by party of the second part to be not less than fifteen (15) in number, with a total capacity of Seven hundred and fifty thousand (750,000) barrels;

And an undivided one-half interest in and to party of the second part's Six Inch Pipe Line known as "Number 2 line" and constructed from the said above described Tank Farm to its "Shaw-C" pump, station

in Section 25, Township 21 North, Range 8 West, in the Homer oil field, together with a like interest in the right of way and telephone line thereon constructed and a like interest in and to the pump station situated on said lease and constituting a part of the said pipe line, with all the buildings and machinery thereunto belonging and an undivided one-half (½) interest in and to a six inch pipe line and right of way therefor, and telephone lines and pump stations therefor, to be built and constructed from said "Shaw C" leases in said Homer Field to the

Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section 14, Township 23 North, Range 8 West,

at the entire expense and cost of party of the second part.

In selling the above described leases and in acquiring said above described pipe line and appurtenances thereto, it is agreed and understood that the said property shall be operated as a partnership property but that party of the second part shall have the control and supervision thereof, it being agreed and understood, however, that party of the second
37 part shall confer with party of the first part, his agent or assigns with reference to the general policy of drilling and marketing and otherwise disposing of the said oil.

It is agreed and understood that if party of the second part does not desire to market the oil produced from the above described leases in due course, that party of the first part shall have the right to sell his equal one-half (½) thereof from the loading rack of Tank Farm, as above stated, upon such terms and for such price as to him may seem fit, or to deliver a sufficient amount of said oil to pay party of the

first part's portion of expense of exploiting said properties, to party of the second part on the basis and for the price that is paid by the Standard Oil Company Pipe Line at that time for a like grade and quality of oil currently produced and marketed from the Caddo Parish oil fields, it being agreed and understood that oil produced from Taylor No. 2 well is equal in grade and quality to Caddo 38 gravity; settlement for said oil to be made on or before the 15th day of the month succeeding that on which same is produced.

It is agreed and understood that party of the first part shall pay one-half (½) of all the expenses necessary and incident to exploiting, developing and producing oil and gas from said above described leases and for the marketing thereof as crude oil, at the loading rack or pipe line connection at the Tank Farm at Minden, Louisiana, together with the necessary expense and upkeep of operating the said pipe line, tank farm and other marketing facilities, together with a like proportion of all rentals, renewals and other expenses made necessary and incidental to keeping the said above described leases in full force and effect on or before the 15th day of the month succeeding that on which said expenses are incurred.

It is further agreed and understood that if party of the second part should desire to manufacture casing head gasoline, that all manufacturing plants made necessary for the purpose of manufacturing said casing head gasoline and all facilities for marketing same at Haynesville, Louisiana, shall be borne equally by the parties hereto and the profits derived therefrom shall likewise be shared equally by parties hereto.

It is further agreed and understood that party of the second part shall have the right of ingress and egress in, on and over any and all leases now owned

by the party of the first part in Claiborne Parish, Louisiana, for the purpose of building and constructing pipe lines, gathering pipe lines, pump stations, water lines and other facilities made necessary for the exploitation of the leases in and to which an undivided one-half (½) interest is herein transferred.

It is agreed and understood by and between the parties hereto that party of the first part shall bear no office or overhead expense made necessary by the above outlined operations for a period of two (2) years, but that the party of the first part shall lend such assistance and cooperation as is necessary and reasonable within his power in the way of securing right of way for a pipe line, assisting in clearing the titles of all defects and encumbrances and otherwise aiding in similar matters pertaining to said leases.

38 Party of the second part agrees to take over from the said James E. Smitherman his contract with Smitherman & McDonald, covering the drilling of the well known as Taylor No. 4, and agrees to carry out his contract with the said Smitherman & McDonald to the extent of two (2) additional wells on the basis of Twenty-five thousand dollars ($25,000.00) per well, turn-key jobs.

It is agreed and understood by and between the parties hereto that party of the second part shall pay over and deliver to the lessors or their assigns, of the premises hereinabove described, the stipulated royalty due to said lessors or their assigns, in accordance with the terms of the said leases on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

It is agreed and understood that party of the second part shall begin the construction for the extension of

its pipe line from "Shaw-C" lease to the Haynesville field on April 19, 1921, and shall prosecute the building thereof with reasonable diligence to its completion, for the purpose of taking oil; and party of the second part guarantees it shall be completed not later than May 5th, 1921.

It is also agreed and understood by and between the parties hereto that the State, parish and local taxes for the year 1921 upon said pipe line, tank farm and appurtenances thereto, shall be paid in proportion of one-fourth (¼) by party of the first part and three-fourths (¾) by party of the second part.

It is also agreed and understood that as a part and parcel of this transfer that party of the first part will assign to party of the second part his rights to one-half of all water and water rights acquired by him from S. T. Hunt of Haynesville, Louisiana, on property situated in Sections 9 and 16, Township 23 North, Range 8 West, as per agreement of record in the Conveyance Records of Claiborne Parish, Louisiana.

In witness whereof the parties hereto have hereunto signed their names in duplicate in the presence of E. G. Palmer and Thos. M. Milling, two competent witness, on this 18th day of April, A. D. 1921.

(Signed) JAMES E. SMITHERMAN,
GILLILAND OIL COMPANY, INC.,
By R. C. GILLILAND.

Witnesses:
(Signed) E. G. PALMER,
T. M. MILLING.

Shreveport, La., June 27th, 1921.

The Foster Oil Company of Tulsa, Oklahoma, having purchased all of the property in Claiborne Parish

and Webster Parish, Louisiana, lately owned by Gilliland Oil Company of Tulsa, Oklahoma, acquired from James E. Smitherman of Tulsa, Oklahoma, acquired from James E. Smitherman of Shreveport, La., and are now operating same with the six inch pipe line, pump stations, etc., from the Guy Taylor lease to Minden Tank Farm, Minden, La.

It is agreed and understood by and between the Foster Oil Company and James E. Smitherman that said property shall be owned and operated under the terms of the above and foregoing working agreement from and after June 22nd, 1921, at 8:00 o'clock A. M.

FOSTER OIL COMPANY,
By J. B. FOSTER, Pres.,
JAMES E. SMITHERMAN.

Witnesses:
E. G. PALMER,
JOHN W. BLUE.

39 State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me the undersigned Notary Public, duly commissioned and sworn, in and for said Parish and State personally came and appeared E. G. Palmer, to me well known, who being by me first duly sworn, did depose and say:

That he was one of the witnesses to the signatures of James E. Smitherman and Gilliland Oil Company, by R. C. Gilliland, signed on April 18th, 1921;

That he saw the said parties sign the said contract in his presence and in the presence of T. M. Milling, the other subscribing witness thereto, on the date and for the purposes and consideration therein set forth.

Affiant further stated that he was one of the witnesses to the supplemental agreement hereinabove written, dated June 27, 1921, and signed by Foster Oil Company, by J. B. Foster, President, and James E. Smitherman.

That the said supplemental contract and agreement was signed in his presence and in the presence of John W. Blue, the other subscribing witness thereto, all for the purposes and consideration therein set forth.

(Signed) E. G. PALMER.

Sworn to and subscribed before me, Notary, on this 28th day of June, 1921.

(Signed) SAM W. MASON,
Notary Public."

Granted.

11. That the location of the discovery well and the leases transferred to the Ohio Oil Company and Gilliland Oil Company are shown on the map filed herein as Exhibit "G".

Granted.

12. That it was the intention of the partnership and of the Ohio Oil Company by said transfers to sub-lease the acreage covered.

Granted.

13. That the partnership received therefor from the transfers aforesaid the following:

From the Ohio Oil Company—

(a) Bonus $3,000,000.00

(b) Right to receive out of ½ first oil, reduced to present worth	900,000.00	
(c) 1/8 excess or overriding royalty, reduced to present worth	1,300,000.00	
40	$5,200,000.00	
From the Gilliland Oil Co.—		
Bonus	$585,750.00	
7/16 interest retained reduced to present worth ..	585,750.00	
	$1,171,500.00	
Aggregate		$6,371.500.00

Granted.

14. The fair value of the property on which the discovery well was brought in, at date of discovery or within thirty days thereafter, was represented by the cash and its equivalent received by the partnership and the value of the interest retained by the partnership aggregating Six million, three hundred seventy-one thousand, five hundred ($6,371,500) Dollars, which was the fair market value of the property on the date of discovery and within thirty days thereafter; the fair market value of the property affected by the transfer to the Ohio Oil Company being $5,200,000.00 and of that affected by the Gilliland transfer being $1,-171,500.00.

Granted.

15. The royalties expected to be received, without reducing to present worth, are as follows:

On transfer to Ohio Oil Co. $1,625,000
On transfer to Gilliland Oil Co. 732,187

Granted.

16. That the cost of the well, being approximately $25,000, the fair market value of the property at date of discovery or within 30 days thereafter was disproportionate to cost.

Granted.

17. The total area, up to the date of discovery, being developed solely by the partnership, was not acquired as a result of the purchase of a proven tract or lease.

Granted.

18. That the partnership filed its returns of income for the calendar year 1921, in March, 1922, and its return of income for the calendar year 1922, in March, 1923, the said returns being filed herein as Exhibits "A" and "B".

Granted.

19. That on the return so filed by the said partnership for the years 1921 and 1922, in determining the net income to be accounted for by the partners, there was deducted from the gross income, among other items, the bonus moneys or advanced royalties paid by the said Ohio Oil Company and the Gilliland Oil Company during said years on account of the
41 said above described transfers.

Granted.

20. That subsequent to the filing of the aforesaid partnership returns, the Commissioner of Internal Revenue upon an audit of same, disallowed as deduc-

tions the amounts of Four million, twenty-three thousand, nine hundred forty-eight and 35/100 ($4,023,948.56) Dollars and Five hundred seventy-six thousand, fifty-one and 44/100 ($576,051.44) Dollars, representing depletion sustained by bonuses, or advanced royalties for the years 1921 and 1922, respectively, thereby increasing the net income of the partnership to be accounted for by members.

Granted.

That said disallowance was based on the theory that the conveyances made by the partnership to the Ohio Oil Company and Gilliland Oil Company, as aforesaid, constituted sales and not sub-leases. The audit letters being filed herein as exhibit "C".

Granted.

21. That matters relating to Geo. O. Baird Partnership were stipulated in an agreed statement of facts filed herein, which the Court is requested to adopt as its conclusions of fact respecting the same subject.

Granted.

22. That timely partnership returns for the years 1921 and 1922 were made by the Geo. O. Baird partnership to defendant; the returns being filed herein as exhibits "D" and "E", and that the audit letters from the Commissioner of Internal Revenue redetermining the net income of the Geo. O. Baird partnership for the same years are filed herein as Exhibit "F".

Granted.

23. Such action of the Commissioner of Internal Revenue with respect to the income of "J. E. Smither-

man, Special Account," and the George O. Baird partnership, for the years 1921 and 1922, was reflected in the individual income tax returns of the petitioner with the result that the said Commissioner, on or about December 21st, 1926, assessed against the petitioner the sum of One hundred twenty-nine thousand, one hundred thirty-eight and 75/100 ($129,-
42 138.75) Dollars, and Thirty-eight thousand, seventy-one and 17/100 ($38,071.17) Dollars, representing additional income taxes alleged to be due for the years 1921 and 1922. The 60 day letter from the commissioner being filed herein as Exhibit "V", with the admission by plaintiff that the adjustments made in plaintiff's income for the years 1921 and 1922, as set forth in said letter, were proper adjustments, with the exception of the adjustment made on account of income derived for the years 1921 and 1922 from the partnership "J. E. Smitherman, Special Account" and the Geo. O. Baird partnership, which are the subject matters of this controversy.

Granted.

24. That in the month of December, 1926, the said Jacob O. Bender, as such Collector of Internal Revenue aforesaid, made demand upon your petitioner for the payment of One hundred sixty-seven thousand, two hundred nine and 92/100 ($167,209.92) Dollars, with interest amounting to Forty-five thousand, seven hundred twenty-seven and 88/100 ($45,727.88) Dollars, representing additional 1921 and 1922 income taxes assessed against him by the Commissioner of Internal Revenue, by letter dated on or about December 21st, 1926, as follows:

1921	$129,138.75
1922	38,071.17
Totaling	$167,209.92

and interest on 1921 tax of	$37,080.51
and 1922 tax of	8,647.37
Totaling	$45,727.88

the aggregate of taxes so assessed and interest being Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,937.80) Dollars.

Granted.

25. That plaintiff paid said sum under protest on January 4, 1927.

Granted.

26. That the petitioner duly filed with the defendant a claim for refund of the taxes and interest so paid, on May 4, 1928, and that said claim was complete in all respects and was in the form and manner as prescribed by the law and regulations governing the filing of claim for refund. That said claim was rejected by the Commissioner of Internal Revenue within six months thereafter and notice of rejection forwarded to petitioner.

43

That the petitioner later amended said claim by the filing of a supplemental claim for refund on June 19, 1928, and no decision thereon has been rendered by the Commissioner of Internal Revenue within six months from the date of filing thereof.

Granted.

27. That the statements stipulated herein with reference to the filing of income tax returns, the audit thereof, the assessment of additional taxes, the payment of taxes, and filing and rejection of claims for refunds, and like formal matters be adopted by the Court as its findings on the same subjects.

Granted.

28. That the tables showing the net incomes of "J. E. Smitherman, Special Account" and Geo. O. Baird partnership, for the years 1921 and 1922, the distributive shares thereof of each partner, the net incomes and personal exemptions of each plaintiff herein and the plaintiffs in the other related suits, as finally determined by the Commissioner of Internal Revenue filed herein by stipulation, be adopted by the Court as its findings on the same subject.

Granted.

29. That the Court adopt as its finding of facts all facts stipulated in the trial hereof.

Granted.

CONCLUSIONS OF LAW.

From the foregoing findings of fact, it is requested that the Court determine as conclusions of law:

1. That the transfer from J. E. Smitherman to the Ohio Oil Company (Exhibit "N") was a sub-lease, and not a sale or assignment as determined by the Commissioner of Internal Revenue.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

2. That plaintiff, as a member of the "J. E. Smitherman, Special Account" partnership, in arriving at net income is entitled to deduct depletion against the bonus or advanced royalty received, on account of the transaction with the Ohio Oil Company, which depletion should be based on discovery valuation.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

3. That such depletion deductions should be computed and allowed under Treasury Decision No. 3938.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

4. With respect to the Geo. O. Baird partnership, the conclusions of law requested to be determined are:

(a) That the agreement with the Gulf Refining Co. of Louisiana of November 16, 1921, was a contract of loan with respect to the $350,000.00 received thereunder, which was not taxable income to plaintiff for the year 1921.

Denied.

(b) That in the event the $350,000.00 was not a loan, then it was not taxable income to plaintiff and his associates, because it did not go to them, but to Munhall (Flannery's assignee), to whom it was paid in satisfaction of his rights under the lease.

Granted.

(c) That the sum of $350,000.00 paid to Flannery's assignee under the judgment resolving the sale to Flannery was a condition precedent to repossession of the property.

Granted.

(d) That the contract did not immediately convey title, but at most only granted a right to demand a conveyance in the future.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(e) That even if the contract could properly have been construed a contract of sale of the lease, the vendor reserved the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 40 Fed. (2) 943.

(f) That plaintfif is entitled to depletion based upon discovery revaluation in either event, viz: whether the contract is considered as not immediately conveying title, but at most as only granting a right to demand a conveyance in the future, or, whether construed as a contract of sale of the lease, the vendor reserving the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 40 Fed. (2) 943.

(g) That in the event the Court should hold the contract to have been other than a contract of loan and to have been an executed as distinguished from an executory agreement, under which title immediately passed, then the contract under the law of Louisiana imported a sub-lease, as distinguished from a sale or assignment, in which case the right to depletion based upon discovery revaluation remained unaffected.

Denied on authority of 40 Fed. (2) 892; 40 Fed. (2) 943.

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
Attorneys for Plaintiff.

Filed July 16, 1930.

45

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted.
16. Granted.
17. Granted.
18. Granted.
19. Granted.
20. Granted.
21. Granted.
22. Granted.
23. Granted.
24. Granted.
25. Granted.
26. Granted.
27. Granted.
28. Granted.
29. Granted.

Conclusions of Law.

1. Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.
2. Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.
3. Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.

4. (a) Denied.
(b) Granted.
(c) Granted.
(d) Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.
(e) Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.
(f) Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.
(g) Denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.

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46 PLAINTIFF'S REQUESTS FOR FINDINGS OF CONCLUSIONS OF LAW.

(Title Omitted.)

Now comes plaintiff, E. G. Palmer, by his attorneys, John H. Tucker, Jr., and Fred R. Angevine, and considering the facts set forth in the plaintiff's requests for findings of fact to be proved, requests that the Court determine as additional conclusions of law the following:

5. That under the law of Louisiana, as expressed in the decisions of the Supreme Court of Louisiana, in the cases of Smith vs. Sun Oil, 165 La. 907 and Johnson vs. Moody, 168 La. 799, the transfer from Smitherman to Ohio Oil Company, dated April 23, 1921 (Ex. N. R. 116) was a sub-lease and not an assignment or sale.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

6. That under the law of Louisiana, as declared by the Supreme Court of Louisiana in the cases of

Spence vs. Lucas, 138 La. 763, Logan vs. State Gravel Co., 158 La. 105, and Board of Commissioners vs. Pure Oil Co., 167 La. 801, royalty under a contract respecting minerals is regarded as rent and governed by the law of lease, and therefore the transfer from Smitherman to Ohio Oil Company, aforesaid, was a sub-lease and not an assignment or sale.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

7. That under the law of Louisiana as contained in the Revised Civil Code in Articles 2046, 2711, 2712 and 2729, thereof, and in the decisions of the Supreme Court of Louisiana in the cases of Knapp vs. Guerin, 144 La. 754, Battalin of Washington Artillery vs. Sillway, 161 La. 925, and Smith vs. Sun Oil Co., 165 La. 907, no right of reversion, as that term is
47 understood at common law, or express right of re-entry, is necessary in Louisiana to constitute the transfer of a lease as a sub-lease.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

8. That tested by the Civil Law of Louisiana, as set forth in the Revised Civil Code and in the jurisprudence of Louisiana and particularly the decision of the Supreme Court of Louisiana in the case of Smith vs. Sun Oil Company, 165 La. 907, the transfer from Smitherman to Ohio Oil Company, aforesaid, was a sub-lease and not a sale or assignment.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

9. That the transfer from Smitherman to Ohio Oil Company, aforesaid, was a Louisiana contract governed by the law of Louisiana, as set forth in the Revised

Civil Code and jurisprudence of Louisiana and is not governed by the common law authorities or the jurisprudence of other states.

Granted.

10. That the transfer from Smitherman to Ohio Oil Company being a Louisiana contract, and governed by the law of Louisiana, and having been made by the parties in reliance upon the law of Louisiana, the decision of the United States Circuit Court of Appeals in the case of Waller vs. Commissioner reported in 40 Fed. Rep. (2nd) 892, construing said transfer to be an assignment and not a sub-lease is equivalent to taking petitioner's property without due process of law and is contrary to the provisions of Art. 1 of the Fourteenth Amendment of the Constitution of the United States.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

Respectfully submitted,
FRED R. ANGEVINE,
SMITHERMAN, TUCKER & MASON,
DART & DART,
HENRY P. DART, JR.,
Attorneys for E. G. Palmer, Plaintiff.

Filed June 10, 1931.

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48 DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Title Omitted.)

The defendant, considering the facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, requests the Court to find the same as follows:

1.

Petitioner filed with the defendant as Collector of Internal Revenue, on March 15, 1922, his individual income tax return for the year 1921, and paid the tax shown to be due thereon. On February 20, 1923, the petitioner filed with the said defendant, his individual income tax return for the year 1922 and paid the tax shown to be due thereon. The petitioner and Mrs. E. G. Palmer are husband and wife, residing in the State of Louisiana.

Granted.

2.

Early in the year 1919, J. E. Smitherman and a group of his associates, including the petitioner, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed, among other
49 things, that if such said parties would lease 15,000 acres of designated land in the vicinity of Haynesville to Smitherman and his associates, that the latter would pay a bonus of Fifty Cents ($0.50) per acre for such leases and drill a test well on the property within eight (8) months after the execution and delivery of the leases. These leases also provided for the payment to the lessors of a one-eighth (1/8th) royalty. A partnership was formed by Smitherman and his associates and was known as "J. E. Smitherman, Special Account", in which E. G. Palmer had an interest of fifteen and five sixths per cent (15-5/6%). Leases were obtained on 26,000 acres, including the Northwest Quarter of Section 14, Township 23 North, Range 8 West, in Claiborne Parish.

Granted.

3.

The partnership either directly or through others, drilled several holes on the leased property in 1920, all of which proved to be dry. On March 30, 1921, a producing well, known as "Anna Taylor No. 2", was brought in with an estimated daily production of 7,000 barrels. This lease was located 580 feet north and 330 feet west of the center of the Northwest Quarter of Section 14, Township 23 North, Range 8 West. Until this well was brought in, the nearest producing well was about twelve miles distant. The cost of the well was slightly over $25,000.00.

Granted.

4.

On April 21, 1921, which was within thirty (30) days after the discovery well, Anna Taylor No. 2, was brought in, Smitherman and the Gilliland Oil Company entered into an agreement relating to the forty (40) acres on which the discovery well was located, which, omitting signatures and attestations, reads as follows—(Exhibit L, R. 106). (References to the Record relate to the record in Waller v. Commissioner, No. 5823, in the Circuit Court of Appeals for the Fifth Circuit, copy of which is on file in this case pursuant to the stipulation of the parties to this cause):

50 "State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me T. M. Milling, Notary Public in and for said Parish and State, duly commismissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's

maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared, that for the consideration hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty, unto the Gilliland Oil Company, a Corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice-President, R. C. Gilliland, duly authorized hereto by Resolution of the Board of Directors, of said corporation, a certified copy of which is attached hereto, its successors and assigns.

"An undivided one-half interest in and to that certain mineral lease executed by Mrs. Annie Taylor et al on March 3rd, 1919, in favor of J. E. Smitherman, filed for record on the 8th day of March, 1919, and recorded on the 30th day of April, 1919, in Book 10, folio 35, Conveyance records of Claiborne Parish, Louisiana, in so far as same covers and effects the Northwest quarter of Northwest quarter (NW¼ of NW¼) of Section Fourteen (14), Township Twenty-three (23) North of Range Eight (8) West, containing forty acres more or less,

"Together with a like interest in the oil well thereon known as Taylor Number Two (2), with all the machinery, appurtenances and attachments thereto belonging; Eight steel storage tanks having a total capacity of Seven thousand barrels together with the oil therein, and the oil in earthern storage heretofore produced by the well known as Taylor No. 2, whether situated on the above described property or not.

"Also a like interest in and to the drilling well known as Taylor Number Four (4), subject however to the

obligation of assignee to pay and discharge one-half of the cost and expenses of drilling said well, all situated in Claiborne Parish, Louisiana.

"To have and to hold unto the said Purchasers, its successors and assigns, subject to the terms and conditions of said mineral leases.

"The consideration for which this sale and assignment is made, is the sum and price of six hundred thousand ($600,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, and full discharge and acquittance granted for same.

"The said parties declared that it is understood between the parties to this agreement that all conditions between the parties hereto extend to their heirs, executors, administrators and assigns.

"Thus done and passed at my office in said Parish of Caddo, in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this the 21st day of April, A. D. Nineteen Hundred and Twenty-one."

51 The recited consideration of $600,000.00 was paid by the Gilliland Oil Company. There was at that time $14,250.00 of oil in storage on the property, payment for which was included in the $600,000.00. On April 18, 1921, Smitherman as party of the first part and Gilliland Oil Company as party of the second part, entered into what they termed a working agreement covering certain acreage including the forty (40) acres on which the well, Anna Taylor No. 2, was located. This agreement so far as material here reads (Exhibit M, R. 109):

"State of Louisiana,
Parish of Caddo.

"Know all men by these presents that this agreement is made and entered into by and between James E.

Smitherman, married to Ina Thompson, a resident of Shreveport, said Parish and State, hereinafter designated as party of the first part, and the Gilliland Oil Company, a corporation organized under the laws of the State of Delaware, authorized to do business in the City of Shreveport, Caddo Parish, Louisiana, herein appearing through R. C. Gilliland, duly authorized and empowered hereto, all as will appear by resolution of the Board of Directors of the said corporation, attached hereto and by reference made a party hereof, hereinafter called party of the second part,

"Witnesseth:

"That for and in consideration of the sum and price of Seven Hundred and Fifty Thousand Dollars ($750,000.00), to be paid in cash and property as hereinafter set forth, party of the first part binds and obligates himself to sell, assign and set over unto the party of the second part, and party of the second part agrees to buy, without warranty, but with full subrogation of all rights and actions of warranty, unto said party of the second part, its successors and assigns, and for the particular consideration set forth, the following described property, to-wit:

"First. An undivided one-half interest in and to the mineral leases covering

"Northwest Quarter (NW¼) of Northwest Quarter (NW¼) of Section Fourteen (14), Township 23 North, Range 8 West, and the South Half (S½) of Southwest Quarter (SW¼) of Southwest Quarter (SW¼) of Section Eleven (11), Township 23 North, Range 8 West, Claiborne Parish, Louisiana,

together with the oil well thereon known as Taylor No. 2, and all drilling wells and equipment, tankage, derricks, etc., situated upon said lease, together with

all the oil produced from said well known as Taylor No. 2, whether situated upon said property or not, for the consideration of the sum and price of Six Hundred Thousand Dollars, ($600,000.00).

52 "Second. An undivided one-half interest in and to leases covering an amount of acreage checkerboarded throughout grantor's leases known as Haynesville acreage and situated in Township 23 North, Ranges Six (6), Seven (7), and Eight (8) West, Claiborne Parish, Louisiana, and in Township 20 South, Range 19 West, Columbia County, Arkansas, equal to approximately one-eighth (1/8) of the acreage owned by the said party of the first part in each and every section in which he owns leases in said area, the total amount of acreage owned by him being approximately Twenty Thousand (20,000) acres and the amount which he is transferring an undivided one-half (½) interest herein being Twenty-five hundred (2500) acres, more or less, for and in consideration of the sum and price of One Hundred and Fifty Thousand Dollars ($150,000.00), the said acreage being more particularly described and set out on a map thereof, reference to which is hereby made, and the said party of the first part agrees to accept as a part of the consideration to be paid by party of the second part for the property as above stated, at a valuation of Two Hundred and Fifty Thousand Dollars ($250,000.00) an undivided one-half interest in and to party of the second part's Tank Farm situated at Minden, Louisiana, together with all of the tanks thereon, loading racks, machinery, pump stations, spur tracks, right of way and equipment, piping, attachments and appurtenances thereto belonging except Eight (8) tanks, at present partially filled with oil, together with the ground upon which said eight tanks stand; the number of tanks herein transferred being guaranteed by

party of the second part to be not less than Fifteen (15) in number, with a total capacity of Seven Hundred and Fifty Thousand (750,000) barrels:

"And an undivided one-half interest in and to party of the second part's Six Inch Pipe Line known as "Number 2 line" and constructed from the said above described Tank Farm to its "Shaw-C" pump station in Section 25, Township 21 North, Range 8 West, in the Homer oil field, together with a like interest in the right of way and telephone line thereon constructed and a like interest in and to the pump station situated on said lease and constituting a part of the said pipe line, with all the buildings and machinery thereunto belonging and an undivided one-half (½) interest in and to a Six Inch pipe line and right of way therefor, and telephone lines and pump stations therefor, to be built and constructed from said "Shaw-C" lease in said Homer field to the

"Southwest Quarter (SW¼) of Southwest Quarter (SW¼) of Section 14, Township 23 North, Range 8 West,

at the entire expense and cost of party of the second part.

"In selling the above described leases and in acquiring said above described pipe line and appurtenances thereto, it is agreed and understood that the said property, shall be operated as a partnership property, but that party of the second part shall have the control and supervision thereof, it being agreed and understood, however, that party of the second part shall confer with party of the first part, his agent, or assigns, with reference to the general policy of drilling and exploiting the said above described leases and marketing and otherwise disposing of the said oil.

53

"It is agreed and understood that if party of the second part does not desire to market the oil produced from the above described leases in due course, that party of the first part shall have the right to sell his equal one-half (½) thereof from the loading rack or Tank Farm, as above stated, upon such terms and for such price as to him may seem fit, or to deliver a sufficient amount of said oil to pay party of the first part's portion of expenses of exploiting said properties, to party of the second part on the basis and for the price that is paid by the Standard Oil Company Pipe Line at that time for a like grade and quality of oil currently produced and marketed from the Caddo Parish Oil field, it being agreed and understood that oil produced from Taylor No. 2 well is equal in grade and quality to Caddo 38 gravity; settlement for said oil to be made on or before the 15th day of the month succeeding that on which same is produced.

"It is agreed and understood that party of the first part shall pay one-half (½) of all the expenses necessary and incident to exploiting, developing and producing oil and gas from said above described leases and for the marketing thereof as crude oil, at the loading rack or pipe line connection at the Tank Farm at Minden, Louisiana, together with the necessary expense and upkeep of operating the said pipe line, tank farm and other marketing facilities, together with a like proportion of all rentals, renewals and other expenses made necessary and incidental to keeping the said above described leases in full force and effect on or before the 15th day of the month succeeding that on which said expenses are incurred.

"It is further agreed and understood that if party of the second part should desire to manufacture casing head gasoline, that all manufacturing plants made necessary for the purpose of manufacturing said casing

head gasoline and all facilities for marketing same at Haynesville, Louisiana, shall be borne equally by the parties hereto and the profits derived therefrom shall likewise be shared equally by the parties hereto.

"It is further agreed and understood that party of the second part shall have the right of ingress and egress in, on and over any and all leases now owned by the party of the first part in Claiborne Parish, Louisiana, for the purpose of building and constructing pipe lines, gathering pipe lines, pump stations, water lines and other facilities made necessary for the exploitation of the leases in and to which an undivided one-half (½) interest is herein transferred.

"It is agreed and understood by and between the parties hereto that party of the first part shall bear no office or overhead expense made necessary by the above outlined operations for a period of two (2) years, but that the party of the first part shall lend such assistance and co-operation as is necessary and reasonable within his power in the way of securing right of way for a pipe line, assisting in clearing the titles of all defects and encumbrances and otherwise
54 aiding in similar matters pertaining to said leases.

"Party of the second part agrees to take over from the said James E. Smitherman his contract with Smitherman and McDonald, covering the drilling of the well known as Taylor No. 4 and agrees to carry out his contract with the said Smitherman & McDonald to the extent of two (2) additional wells on the basis of Twenty-five Thousand Dollars ($25,000.00) per well, turn-key jobs.

"It is agreed and understood by and between the parties hereto that party of the second part shall pay

over and deliver to the lessors or their assigns, of the premises hereinabove described, the stipulated royalty due to said lessors or their assigns, in accordance with the terms of the said leases on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

"It is agreed and understood that party of the second part shall begin the construction for the extension of its pipe line from "Shaw-C" lease to the Haynesville field on April 19, 1921, and shall prosecute the building thereof with reasonable diligence to its completion, for the purpose of taking oil; and party of the second part guarantees it shall be completed not later than May 5th, 1921.

"It is also agreed and understood by and between the parties hereto that the State, parish and local taxes for the year 1921 upon said pipe line, tank farm and appurtenances thereto, shall be paid in proportion of one-fourth (¼) by party of the first part and three-fourths (¾) by party of the second part.

"It is also agreed and understood that as a part and parcel of this transfer that party of the first part will assign to party of the second part his rights to one-half of all water and water rights acquired by him from S. T. Hunt of Haynesville, Louisiana, on property situated in Sections 9 and 16, Township 23 North, Range 8 West, as per agreement of record in the Conveyance Records of Claiborne Parish, Louisiana.

"In witness whereof the parties hereto have hereunto signed their names in duplicate in the presence of E. G. Palmer and Thos. M. Milling, two competent witnesses, on this 18th day of April, A. D. 1921."

Granted.

5.

On April 23, 1921, which was within thirty days after the discovery well, Anna Taylor No. 2, was brought in, Smitherman entered into an agreement with The Ohio Oil Company relating to the remaining 120 acres of the Quarter Section in which the discovery well was located, which, omitting signatures and attestations, is as follows—(Exhibit N, R. 116):

54 "State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me Sam W. Mason, a Notary Public duly commissioned and sworn in and for said Parish and State, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled in the City of Findlay, County of Hancock, State of Ohio, herein appearing for the purpose of accepting this assignment through its agents and attorney in fact, O. D. Donnell, Vice President, duly authorized and empowered hereto by a resolution of the Board of Directors of said Company, a certified copy of which is attached hereto, and by reference made part hereof, the following described property situated in the Parish of Claiborne, State of Louisiana, and particularly described as follows, towit:

"That certain oil, gas and mineral lease acquired by James E. Smitherman, from Mrs. Annie Taylor et al.,

dated March 3rd, 1919, and recorded April 30th, 1919, in Conveyance Book 10, page 35, of Records of Claiborne Parish, Louisiana, insofar as same covers and effects.

"East half (E½) of Northwest quarter (NW¼) and Southwest quarter (SW¼) of Northwest quarter (NW¼) of Section 14, Township 23 North, Range 8 West, containing one hundred twenty acres more or less.

"To have and to hold unto the said The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigned.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of three million dollars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefore, and the obligation of said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver unto said assignor, his heirs, executors and assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his heirs or assigns.

"It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman, his heirs and assigns, shall share in the profits
56 derived from the manufacture of said product to the extent of an undivided one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

"The appearers further declared that it is agreed and understood by and between them that the deferred payments to be made out of the oil, as well as settlements for the one-eighth (1/8) excess royalty herein above stipulated, shall be made on or before the 15th day of the month succeeding that during which the oil is removed from the premises."

The recited consideration of $3,000,000 was paid by The Ohio Oil Company and the partnership also received the additional $1,000,000.00 provided for in the agreement.

Granted.

6.

On April 23, 1921, The Ohio Oil Company addressed a letter to Smitherman, as follows—(Exhibit P, R. 123):

Granted.

"The Ohio Oil Co.

Shreveport, La., April 23, 1921.

"Mr. J. E. Smitherman,
Shreveport, Louisiana.

"Dear Sir:

"With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North, Ranges 7 and 8 West, and in Twp. 23 North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender or cancel all or any part of any one of all of said leases then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors."

Granted.

7.

On July 12, 1921, Smitherman and The Ohio Oil Company entered into what they deemed a working agreement concerning certain lands, including
57 the 120 acres which were the subject of the agreement of April 23, 1921. This agreement was in writing and so far as material is as follows—(Exhibit O, R. 119):

"Memorandum of Agreement, made and entered into this 12th day of July, 1921, by and between James E. Smitherman of Shreveport, La., hereinafter referred to as Smitherman, and the Ohio Oil Company, an Ohio corporation, hereinafter referred to as the Ohio,

Witnesseth:

"Whereas: By the terms of certain assignments from James E. Smitherman to the Ohio Oil Company conveying to said Company certain interest in oil and gas lease in Claiborne Parish, State of Louisiana, and in the County of Columbia, State of Arkansas, said instruments of assignment being recorded in Book 45, page 392, records of Columbia County, Arkansas, and in Book 28, page 15 to 25 inc., of the conveyance records of Claiborne Parish, La., the Ohio Oil Company agreed to pay over and deliver to the said Smitherman the equal one-eighth (1/8) part of all oil produced and saved from the premises so assigned. Now, therefore, this agreement to provide for gathering, storing and disposing of such one-eighth interest. In consideration of the sum of one dollar each to the other paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants herein contained it is agreed as follows:

"First: The Ohio shall have control of said Smitherman one-eighth interest, with the right to place in storage commingled with the Ohio's oil or any other oil that may be stored in such tanks from the Smitherman leases, for as long as it shall think wise, all or any part of said interest, and the right at any time to sell with the Ohio's portion of the oil, any part or all of such interest at the price the Ohio shall at the time be receiving for its oil run from the tank farm in the Haynesville, La., field, settlement for oil sold to be made on or before the 15th day of the month succeeding that in which the oil is so sold, such settlements to be made subject to any deductions that may be made by the Pipe Line Company at the time the oil is run.

"In consideration whereof the Ohio agrees, upon the payment to it by said Smitherman of the sum of fifteen hundred dollars ($1,500.00) to convey to Smitherman

an undivided one-eighth (1/8) part of the interest acquired by it in and to the following described land: The Northwest quarter (NW¼) and the Northwest quarter of the Southwest quarter (NW¼ of SW¼) less 15 acres off of the South side of said last described tract, all in Section 13, Township 23 North, Range 8 West, Claiborne Parish, La., containing 185 acres, more or less, upon which are now being erected oil storage tanks, the Ohio reserving to itself however, the one one hundred and twenty-eighth (1/128) royalty interest acquired by it by deed of conveyance from Frank M. Taylor.

"Second: It is further agreed that Smitherman shall have and own an undivided one-eighth interest in all tanks erected on said land upon the payment to the Ohio of an equal one-eighth of the cost of all such tanks now on said land or to be erected thereon, payment to be made promptly upon receipt of
58 bills from the Ohio.

"Third: The Ohio agrees further that it will construct the necessary gathering lines at its own expense, convey the oil to storage tanks, and market the Smitherman one-eighth interest for a consideration of eight cents (8¢) per barrel payable on or before the 15th day of the month following that during which the oil is run into the storage tanks.

"Fourth: It is agreed further that Smitherman shall pay to the Ohio the one-eight part of any charge that may be made by the Louisiana and Northwest Railroad on account of the construction and maintenance of a railroad siding on said tank farm and now being used for the transportation of tank material.

"Fifth: Smitherman agrees to join with the Ohio in the execution of any division orders required to accom-

plish the sale of all or any part of the oil produced from the lands described in the assignments above referred to.

Sixth: It is further understood that the Ohio shall not be responsible for the loss of any such oil so placed in storage, by reason of evaporation or fire, or otherwise, except that if the Ohio shall carry insurance on such oil Smitherman shall pay one-eighth of the cost of such insurance and be protected to the extent of his interest so insured."

Granted.

8.

On April 23, 1921, Smitherman and The Ohio Oil Company entered into an agreement, regarding other leases running to the partnership covering approximately 17,000 acres of land, which are not involved in this proceeding except in so far as said agreements relate to or tends to show the value of the other leases conveyed to the Ohio Company, and the Gulf Refining Company of Louisiana. (Exhibits Q & R.)

Granted.

9.

By reason of the discovery well being to the north and west of the center of the northwest quarter of Section 14 (Township 23 North, Range 8 West), the boundary lines of the 160 acres embraced in the discovery area as recognized by the Commissioner do not coincide with the boundaries of the Government survey of the Quarter Section. The boundary line of the discovery 160 acres laid out under the method recog-

nized by the Commissioner's Regulations include all of the Northwest Quarter of the Northwest Quarter of Section 14, and only 74 acres of the remaining 120 acres. That is, these boundaries include all of the 40 acres on which the Anna Taylor No. 2 well was located and with respect to which the transaction with the Gilliland Oil Company was entered into; they
59 include 74 acres of the remaining 120 acres with respect to which the transaction with the Ohio Oil Company was entered into; and they exclude 46 acres covered by the Ohio Oil Company transaction.

Granted.

10.

In the year 1919, George O. Baird, acting for himself and associates, as hereinafter set out, acquired a certain oil and gas lease on a then unproven area consisting of about 51 acres and known as the "Langston Lease" in said Claiborne Parish. The lease was taken for the use and benefit of the following named persons in the proportion here set out, to-wit:

(a) The George O. Baird Partnership, composed of George O. Baird, E. G. Palmer, R. T. Layne, J. A. Thigpen and S. L. Herold, equally, an undivided one-half interest; or an undivided one-tenth interest each.

(b) Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., an undivided one-fourth interest; or an undivided one-eighth interest each.

(c) Mrs. J. A. Thigpen and Mrs. S. L. Herold, an undivided one-fourth interest; or an undivided one-eighth interest each.

11.

All of the parties above named were at the time of their acquisition of their respective interests in said lease and throughout the years in controversy, to-wit:

1919, 1920, 1921 and 1922, citizens of and domiciled in the State of Louisiana and were married, so that each such interest was community property vesting title in one-half of the interest so acquired in the husband and one-half in the wife. R. T. Layne died on March 20, 1920, leaving as his sole surviving heir, Mrs. R. T. Layne, who became a member of the George O. Baird partnership by virtue of the inheritance of her husband's one-half of the community estate, and under the community property laws of Louisiana, as owner of the other half.

60 12.

Baird and his associates above named drilled a well on the said unproven tract, which resulted in the discovery of oil on August 23rd, 1919. Their rights as discoverers to a revaluation, based on discovery under the provisions of the Revenue Law, were duly asserted and have been formally recognized by the Commissioner; the discovery revaluation having been fixed by the Commissioner at $1,011,397.67 and the unit for depletion purposes having been definitely found and adjudged by the Commissioner to be $1.3859 per barrel.

13.

On December 10th, 1919, George O. Baird, with the consent of and representing all his associates as well as himself, entered into a contract with J. Rogers Flannery, a copy of which contract was received in evidence, marked Exhibit W, and by this reference is made a part hereof. Said contract provided in part as follows:

"This agreement, made and executed this 10th day of December, A. D. 1919, by and between George O.

Baird, a resident of Caddo Parish, Louisiana, and J. Rogers Flannery, of Pittsburgh, Pennsylvania, Witnesseth:

"1. The said Biard has agreed to sell with full warranty of title, and the said Flannery has agreed to buy, on the terms, conditions and consideration hereinafter set out, the following described property situated in the Parish of Claiborne, State of Louisiana, to-wit: (Here follows description of George O. Baird-Langston Lease).

"2. The price of the said sale is the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.-00), which the said Flannery binds and obligates himself to pay in the manner and on the terms here set out, to-wit:

"3. With the signing of this act the said Flannery has paid to the said Baird the sum of Five Hundred Thousand Dollars ($500,000.00), the receipt whereof is hereby acknowledged, and further binds and obligates himself to pay on or before the eighth day of February, 1920, to the said Baird the further sum of Three Hundred Thousand Dollars ($300,000.00).

"Upon the failure of the said Flannery to make the said payment on or before the date above specified the said Baird shall have the right and option after giving to the said Flannery fifteen days' notice in writing of his intention so to do, to declare the forfeiture of this contract and to retain the sums already paid, and any retention of said sums shall be in full liquidation and settlement of damages and in lieu of any other or further damages whatsoever which the said Baird, his heirs or assigns, might claim, and operate as a release and discharge of said Flannery, his heirs and assigns, of and from any and all liability whatsoever incurred under or by virtue hereof.

61 "4. When the said Flannery shall have paid to the said Baird under the aforesaid terms the sum of Eight Hundred Thousand Dollars ($800,000.00), then the said Baird shall execute to the said Flannery a good and sufficient deed to the property herein sold, taking the notes of the said Flannery for the remainder of the purchase price, five (5) of the said notes to be in the sum of Three Hundred Thousand Dollars ($300,000.00) each, due on or before thirty (30), sixty (60), ninety (90), one hundred twenty (120) and one hundred fifty (150) days, respectively, after date of said deed, and one (1) note for the sum of Two Hundred Thousand Dollars ($200,000.00), due on or before one hundred eighty (180) days after date of execution of the said deed, said notes bearing five (5) per centum per annum interest from date; said notes to be secured by said property and the production thereof, subject, however, to a provision that, so long as the said notes are being promptly paid at maturity, no part of production from said wells shall be withheld from the purchaser on account of the said security. Said notes also to be subject to the right of payment before maturity, with interest to date of payment, as hereinafter provided.

"5. At any time after January 1, 1920, the said Flannery shall have the right to make payment of the entire unpaid balance of the said purchase price, with such interest only as may have accrued to date of payment, and contemporaneously with such payment to receive from the said Baird, and the said Baird shall deliver, a good and sufficient deed for the property herein sold, or, if said deed has already been delivered under the provisions of the preceding paragraph, then the said Baird shall forthwith deliver and return to the said Flannery any and all promissory notes given under the said preceding paragraph for any part of the said purchase price.

"6. Upon payment of the said sum of Eight Hundred Thousand Dollars ($800,000.00) and the execution of the deed and notes as aforesaid, as provided in paragraph 4, or upon payment of the entire unpaid balance of the said purchase price as provided in paragraph 5, the said Flannery shall be entitled to credit for the proceeds of all the oil run and sold from the property from and after 7:00 A. M. November 8, 1919, and shall pay to the said Baird all sums expended by him for or on account of the development of the said properties from and after said date."

Under this contract, Flannery paid, on December 10, 1919, as therein recited, the sum of $500,000.00. Part of said sum was used by Baird to pay certain obligations of Flannery's; the balance after such payments, amounting to $350,000.00, being the net sum paid on that date by Flannery under the terms of the contract. As authorized by the agreement, Baird retained for his security the possession of the property and continued its operations.

62

14.

On December 30th, 1920, George O. Baird, E. G. Palmer, J. A. Thigpen, and S. L. Herold purchased from Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., the whole of their interest in the aforesaid Langston lease, which interest (like that of all the other parties named except Baird) had been represented by written instruments signed by Baird but not recorded.

15.

Flannery failed to make any payments other than his original cash payment, or otherwise to comply with his obligation under the contract, "Exhibit W". Accordingly, on January 11th, 1921, Baird instituted a

suit in the Third Judicial District Court of Louisiana, in and for the Parish of Claiborne, demanding a resolution of the contract for non-performance of its conditions. The suit was contested by Flannery; the case was put at issue; trial was had and there was final judgment on the 9th day of November, 1921, decreeing a restoration of the status quo before the contract, including the return by Baird to Flannery of the $350,000.00, which he, Baird, had received from Flannery on December 10th, 1919. A certified copy of the proceedings in the above case, including the pleadings and the judgment, was received in evidence, marked Exhibit X and by this reference made a part hereof the same as if set out in full.

16.

As shown by the record referred to as Exhibit X, Flannery had, subsequent to the suit but prior to judgment, assigned all his rights under the aforesaid contract, Exhibit W, to one John Munhall, Jr., so that the judgment as finally rendered was against Munhall as assignee of Flannery.

17.

On November 16th, 1921, George O. Baird, acting for himself and his then co-owners, made an agreement with the Gulf Refining Company of Louisiana, which was embodied in the written contract, which was received in Evidence, as Exhibit Y. Said contract is as follows:

63 "This agreement between George O. Baird, husband of Estella Mitchell, a resident of Caddo Parish, Louisiana; and the Gulf Refining Company of Louisiana, a corporation under the laws of the State of Louisiana, and domiciled at Orleans Parish, witnesseth:

"1. That said Baird is the owner of an oil and gas lease covering all of the S½ of the NE¼ of Section 24, Township 21 North, Range 8 West, less the West 30 acres thereof; and less also about one (1) acre in a square in the southwest corner of said described property, as to which one acre, however, the said Baird is the owner of an undivided one-half (½) interest, the Gulf Refining Company of Louisiana being the owner of the other undivided one-half interest in the lease covering the said one acre; the lease above referred to including the eleven (11) oil wells on the said property, all the equipment thereto annexed and attached, together with the interest of the said Baird in the one well located on said one acre tract hereinabove referred to.

"2. For and in consideration of the obligations and agreements hereinafter set out, the Gulf Refining Company of Louisiana has obligated itself and does hereby agree to take possession of the said lease, to equip same properly at its own expense, and to operate such wells diligently for the production of oil, and to maintain the said production as long as oil may be produced therefrom in paying quantities; all such equipment and operation to be at the entire expense of the Gulf Refining Company of Louisiana and free from any expense whatsoever to the said Baird. And all taxes of every character legally assessed and charged against said lease, including all severance tax on the production therefrom, except as to the royalty interests, shall be paid by the Gulf Refining Company of Louisiana.

"3. For and in consideration of the obligation of the Gulf Refining Company of Louisiana to equip and to operate said property free of expense to him, the said George O. Baird agrees that the Gulf Refining Company of Louisiana, may retain from the produc-

tion of the said property, forty per cent (40%) of the oil produced therefrom, the agreement between the parties being that out of the said 40 per cent so retained by the Gulf Refining Company of Louisiana, that company shall deliver the royalty of one-eighth (1/8th) of the oil, as provided for in the lease covering said property. and shall in addition deliver to the said Baird for a term of three (3) years, beginning the 1st day of November, 1921, one-twenty-fourth (1/24th) of all the oil that may be saved from that produced from the said property, the said delivery to be made in the same manner in which the royalty is to be delivered to the lessors, under the provisions of the original lease.

"4. In consideration of this obligation and agreement, as hereinabove set out, the Gulf Refining Company of Louisiana shall have, however, the right to all of the gas, including casing-head gas, extracted from the wells on the said property, and all profits therefrom accruing, subject to such contracts as it may be able to secure from the lessors of the said property, and free from any obligation to account to the said Baird for any of the said gas or any of the profits derived from its manufacture or sale.

64 "5. The Gulf Refining Company of Louisiana has this day loaned to the said George O. Baird, the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, on the sole security of the said lease, without any personal liability. And, in order to secure the repayment of the said sum within thirty (30) months from this date, the said Baird has, and does by these presents, mortgage and hypothecate unto the said Gulf Refining Company of Louisiana all of his right, title and interest thereto, and, in addition to further secure said obligation, pledges unto the said Gulf Refining Company of

Louisiana, all of the oil that may be saved from that produced from the said leased lands, after the delivery of the royalty of one-eighth (1/8th) to the lessors, and the one-twenty-fourth (1/24th) to the said Baird, as hereinabove provided.

"It is distinctly agreed and understood, however, that the Gulf Refining Company of Louisiana will as hereinabove set out deliver to the said Baird sixty per cent (60%) of the oil produced from the said property, notwithstanding the said mortgage and pledge and free from any claim thereunder, until the said Baird shall have received from the said production sufficient oil to yield him, at the market price prevailing on the date of delivery, and at which price he will be able to sell said oil, the sum of Three Hundred and Twenty-five Thousand ($325,000.00) Dollars, from the 60 per cent (60%) of the oil produced from the said property, which the said Gulf Refining Company of Louisiana has under this agreement obligated itself to deliver.

"After the said Baird shall have received from the 60 per cent of the oil so delivered to him the sum of $325,000.00, or after the expiration of the 30 months from this date, if the said Baird shall not have received such amount from the said production within that time, then the Gulf Refining Company of Louisiana shall have the right to apply such 60 per cent of the oil, or the proceeds thereof, to the repayment of the said loan until same shall have been paid in full, without interest.

"6. In consideration of the obligations and agreements hereinabove entered into on the part of the Gulf Refining Company of Louisiana, the said Baird now agreed and obligates himself that whenever there shall have been produced from the said property by

the Gulf Refining Company of Louisiana such quantity of oil that the 60 per cent which the said Gulf Refining Company of Louisiana has agreed herein to deliver to him, shall have produced the sum of Six Hundred and Seventy-five Thousand ($675,000.00) Dollars (the first $325,000.00) of the proceeds of the sale of such oil to be retained by Baird as above provided, and the remaining $350,000.00 to be retained by said Company, to be applied by it to the liquidation of the indebtedness above set out, that he will then sell, assign, convey, and deliver to the said Gulf Refining Company of Louisiana the entirety of the said mineral lease hereinabove referred to and forming the subject matter of this contract, for the consideration of the obligation upon the part of the Gulf Refining Company of Louisiana to continue to operate said property for the production of oil for such length of time as it may be able to produce oil therefrom in paying quantities, and to deliver to him, or his transferees, the one-twenty-fourth (1/24th) royalty out of the oil, as hereinabove provided, until the expiration of three (3) years from this date, and a royalty of one-thirty-second (1/32nd) of all the oil that may be saved from that produced, after said date, and as long thereafter as oil may be produced from the said property in paying quantities.

65 "7. As further security to the Gulf Refining Company of Louisiana for the performance of the obligation to sell as set out in the last preceding paragraph, the said Baird has this day executed an assignment in favor of said company of his entire interest in the said lease, which said assignment he agrees to deposit in escrow with such depositary as may be mutually agreed upon by the parties, to be retained by said trustee and to be delivered to the Gulf Refining Company of Louisiana, when it shall have complied with the obligations above set out and

made a consideration of said assignment; said assignment so delivered in escrow shall moreover be considered between the parties thereto as a further security for the pledge and mortgage hereinabove stipulated.

"In witness of which, this agreement has this day been executed in duplicate, the said Gulf Refining Company of Louisiana being represented therein by its Third Vice-President, C. R. Minor, being herein authorized, and this agreement being executed as of and effective from seven-thirty o'clock A. M., November 1, 1921. Shreveport, La., Nov. 16th, 1921."

The sum of $350,000.00 therein mentioned was not paid to Baird and/or his co-owners, but at their direction and for their benefit was paid by the Gulf Refining Company of Louisiana to John Munhall, Jr., through the Mellon National Bank of Pittsburgh, Pennsylvania, in compliance with the terms of the judgment which has heretofore been filed in evidence as part of Exhibit X.

18.

As provided in the contract filed and marked Exhibit Y, the Gulf Refining Company of Louisiana took physical possession of the property, and as therein provided a deed was executed by Baird and deposited in escrow with an escrow agent agreed upon by both parties, to be delivered under the conditions recited in Exhibit Y. The deed remained in the hands of the escrow agent under the terms of the escrow agreement throughout the remainder of the year 1921 and through all of 1922, and until some time in the year 1927, when same was delivered by the escrow agent to the Gulf Refining Company of Louisiana.

Requested findings of fact 10 to 13 inclusive, are denied and the facts are found to be as stipulated in the record.

19.

The petitioner reported as income for 1921 an amount representing his distributive share of the sixty per cent of the seven-eighths of the aforesaid oil, described in Paragraph 17 hereof, deducting therefrom depletion based upon the discovery revaluation previously allowed by the Commissioner. The petitioner also reported as income for 1921, an amount representing his proper distributive share of the income of the partnership, J. E. Smitherman, Special Account, deducting depletion based upon a claimed discovery value. The assessment giving rise in part to this action was the result of the disallowance of the claimed deduction for 1921 and of the Commissioner's holding that the $350,000.00 referred to in the contract with the Gulf Refining Company of Louisiana (Exhibit Y) was income to the Baird Partnership in the year 1921, and that no account was to be taken of the payment of the sum of $350,000.00 made a condition by the judgment (Exhibit X) of the repossession of the property.

66

Granted.

20.

The taxpayer in 1922 correctly reported an amount representing his proportion of the sixty per cent of the seven-eighths of the oil production (See Paragraph 17 hereof), deducting therefrom depletion based upon the discovery revaluation previously determined by the Commissioner. The petitioner also reported as income for 1922, an amount representing his proper distributive share of the income of the partnership, J. E. Smitherman, Special Account, deducting depletion based upon a claimed discovery value. The assessment giving rise in part to this action was the result of a disallowance of the claimed depletion for the year 1922.

Granted.

67 CONCLUSIONS OF LAW.

And from the foregoing findings of fact, the Court is asked to decide as conclusions of law:

1.

The instruments in question relating to the transactions of the Smitherman Partnership were assignments or acts of sale, and not subleases.

Granted on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

2.

The instruments in question relating to the transactions of the Baird Partnership were assignments or acts of sale and not subleases, pledges or mortgages.

Granted on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

3.

The $350,000.00 paid by the Gulf Refining Company to Flannery's assigns for the benefit and at the direction of the Baird partnership was properly included in the income of said partnership for 1921.

Denied.

4.

The evidence does not show the fair market value of the property with respect to which depletion is claimed.

Denied.

5.

No further deductions from gross income are allowable in either 1921 or 1922 on account of depletion. (If the instruments in question were not acts of sale, it is apparent that the transferors had parted with all their interest in the depletable property and are not therefore, not entitled to depletion).

First sentence granted, second denied.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana, Attorney for Defendant.

Of Counsel:
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
ELDON O. HANSON,
Special Attorney,
Bureau of Internal Revenue.

Filed July 3, 1930.

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68 STIPULATION.

(Title Omitted.)

(Statement of facts as to George O. Baird Partnership.)

In the above numbered and entitled cause the following statement of facts is hereby stipulated with respect to matters growing out of the George O. Baird

Partnership, which has reference also to Suit No. 1905, Mrs. E. G. Palmer vs. Jacob O. Bender, Collector, and Suit No. 1906, Mrs. J. K. Findley vs. Jacob O. Bender, Collector.

1.

In the year 1919, George O. Baird, acting for himself and associates, as hereinafter set out, acquired a certain oil and gas lease on a then unproven area consisting of about 51 acres and known as the "Langston Lease" in said Claiborne Parish. The lease was taken for the use and benefit of the following named persons in the proportion here set out, to-wit:

(a) The George O. Baird Partnership, composed of George O. Baird, E. G. Palmer, R. T. Layne, J. A. Thigpen and S. L. Herold, equally, an undivided one-half interest; or an undivided one-tenth interest each.

(b) Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., an undivided one-fourth interest; or an undivided one-eighth interest each.

(c) Mrs. J. A. Thigpen and Mrs. S. L. Herold, an undivided one-fourth interest; or an undivided one-eighth interest each.

2.

All of the parties above named were at the time of their acquisition of their respective interests in said lease and throughout the years in controversy, to-wit: 1919, 1920, 1921 and 1922, citizens of and domiciled in the State of Louisiana and were married, so that each such interest was community property vesting title in one-half of the interest so acquired in the husband and one-half in the

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wife. R. T. Layne died on March 20, 1920, leaving as his sole surviving heir, Mrs. R. T. Layne, who became a member of the George O. Baird partnership by virtue of the inheritance of her husband's one-half of the community estate, and under the community property laws of Louisiana, as owner of the other half.

3.

Baird and his associates above named drilled a well on the said unproven tract, which resulted in the discovery of oil on August 23rd, 1919. Their rights as discoverers to a revaluation, based on discovery under the provisions of the Revenue Law, were duly asserted and have been formally recognized by the Commissioner; the discovery revaluation having been fixed by the Commissioner at $1,011,397.67 and the unit for depletion purposes having been definitely found and adjudged by the Commissioner to be $1.3859 per barrel.

4.

On December 10th, 1919, George O. Baird, with the consent of and representing all his associates as well as himself, entered into a contract with J. Rogers Flannery, a copy of which contract is here offered and filed in evidence and marked "Exhibit W". Under this contract, Flannery paid, on December 10th, 1919, as therein recited, the sum of $500,000.00. Part of said sum was used by Baird to pay certain obligations of Flannery's; the balance after such payments, amounting to $350,000.00, being the net sum paid on that date by Flannery under the terms of the contract. As authorized by the agreement, Baird retained for his security the possession of the property and continued its operations.

5.

On December 30th, 1920, George O. Baird, E. G. Palmer, J. A. Thigpen, and S. L. Herold purchased from Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., the whole of their interest in the aforesaid Langston lease, which interest (like that of all the other parties named except Baird) had been represented by written instruments signed by Baird but not recorded.

6.

Flannery failed to make any payments other than his original cash payment, or otherwise to comply with his obligation under the contract, "Exhibit W". Accordingly, on January 11th, 1921, Baird instituted a suit in the Third Judicial District Court of Louisiana, in and for the Parish of Claiborne, demanding a resolution of the contract for non-performance of its conditions. The suit was contested by Flannery; the case was put at issue; trial was had and there was final judgment on the 9th day of November, 1921, decreeing a restoration of the status quo before the contract, including the return by Baird to Flannery of the $350,000.00 which he, Baird, had received from Flannery on December 10th, 1919. A certified copy of the proceedings in the above case, including the pleadings and the judgment, is offered and filed in evidence and marked "Exhibit X".

7.

As shown by the record referred to as Exhibit X, Flannery had, subsequent to the suit but prior to judgment, assigned all his rights under the aforesaid contract, "Exhibit W" to one John Munhall, Jr.; so that the judgment as finally rendered was against Munhall as assignee of Flannery.

8.

On November 16th, 1921, George O. Baird, acting for himself, and his then co-owners, made an agreement with the Gulf Refining Company of Louisiana, which was embodied in the written contract now offered and filed in evidence as "Exhibit Y". The sum of $350,000.00 therein mentioned was at the direction of said Baird paid by the Gulf Refining Company of Louisiana to John Munhall, Jr., through the Mellon National Bank of Pittsburgh, Pennsylvania,
71 in compliance with the terms of the judgment which has heretofore been filed in evidence as part of "Exhibit X".

9.

As provided in the contract filed and marked "Exhibit Y", the Gulf Refining Company of Louisiana took physical possession of the property, and as therein provided a deed was executed by Baird and deposited in escrow with an escrow agent agreed upon by both parties, to be delivered under the conditions recited in "Exhibit Y". The deed remained in the hands of the escrow agent under the terms of the escrow agreement throughout the remainder of the year 1921 and through all of 1922, and until some time in the year 1927, when same was delivered by the escrow agent to the Gulf Refining Company of Louisiana.

10.

Each taxpayer returned as income in 1921 his proper proportion of the 60 per cent of seven-eighths of the aforesaid production, deducting therefrom depletion based upon the discovery revaluation previously allowed by the Commissioner.

The assessment giving rise in part to these actions was the result of a disallowance of such depletion and

of the Commissioner's holding that the $350,000.00 referred to in the contract with the Gulf Refining Company of Louisiana, "Exhibit Y" was income to the taxpayers in the year 1921 and that no account was to be taken of the payment of the same sum of $350,-000.00 made a condition by the judgment (Exhibit X) of the repossession of the property.

11.

Each of the taxpayers in 1922 correctly reported his proportion of the 60 per cent of the seven-eighths of the oil production and its value, deducting therefrom discovery depletion as theretofore determined and adjudged by the Commissioner. The assessment giving rise in part to these suits rejected the depletion so claims.

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12.

The books of the George O. Baird partnership show the transaction between them and the Gulf Refining Company of Louisiana (Exhibit Y) as a loan by the Gulf Refining Company of Louisiana under the terms and conditions of the said written escrow and a retention by them of the ownership of the lease. The George O. Baird partnership books and records, kept on a receipts basis, as do their returns, show the receipt by them of the 60 per cent of seven-eighths of the oil and its sale by them.

JOHN H. TUCKER,
FRED R. ANGEVINE,
Attorneys for Plaintiff.
PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

73 (Title Omitted.)

For Plaintiff:
Messrs. Fred R. Angevine, 25 Broad St., New York City.
Smitherman, Tucker & Mason, Shreveport, La.

For Defendant:
Messrs. Philip H. Mecom, U. S. Attorney, and J. Fair Hardin, Asst. U. S Attorney, Shreveport, Louisiana,
E. O. Hanson, Washington, D. C.

DAWKINS, J.:

Plaintiff brings this suit to recover the sum of $212,937.80, paid under protest as income taxes for the years 1921 and 1922. It is one of forty-five similar cases consolidated for the purpose of trial. The claim arises out of two agreements affecting oil production, known as the "J. E. Smitherman Special Account" and George O. Baird partnerships, respectively.

With respect to the J. E. Smitherman Special Account partnership, I find as follows:

Smitherman, for himself and associates, during the year 1919, made an agreement with property owners in the vicinity of Haynesville, La., that, if provided with mineral leases to as much as 15,000 acres of land, he would drill within eight months a test well for the discovery of oil or gas. The leases also provided for the payment of fifty cents per acre, as rentals, and a royalty of one-eighth of the minerals produced. Approximately 26,000 acres were leased, in which the interest of plaintiff was 15-5/6%. A number of dry holes were drilled during the years 1919, 1920 and 1921, but on March 30th of the latter year, a well was brought in on what was

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known as the Anna Taylor lease, covering the northwest quarter of Sec. 14, Township 23, North Range 8 West, Louisiana Meridian, with an established daily production of 7,000 barrels. The discovery was made in what was conceded to have been "wild-cat" territory.

On April 18, 1921, Smitherman entered into a contract with the Gilliland Oil Company, in which, for the sum of $750,000, "to be paid in cash and property as hereinafter set forth", he agreed to "sell, assign and set over" to said company and it agreed "to buy, without warranty, but with full subrogation of all rights and actions of warranty", an undivided one-half interest in one forty acres of the said Anna Taylor tract, to-wit: the northwest quarter of the northwest quarter of Section 14, Township 23 N. R. 8 West, on which the discovery well was located, and eighty acres in Section 11, adjoining it, together with all drilling wells, equipment, tankage, derricks, etc., situated on the Taylor property, as well as the oil which had been produced; and, of which price, the sum of $600,000 was to be attributed to the property so described. For the balance of $150,000, Smitherman bound himself to convey certain other leases. As part of the consideration, he agreed to accept at a value of $250,000, a one-half interest in a certain tank farm, equipment and facilities for handling the oil, including pipe lines built and to be built. It was also stipulated that all of the property, including that to be conveyed by Smitherman, and in which he was to acquire an interest, should be "operated as a partnership property", under the control and supervision of the Gilliland Oil Company, but with the right of the former to be consulted as to the general policy of
"drilling and exploiting the leases and market-
75 ing the oil". Further provision was made
allowing Smitherman to sell his part of the oil, if he saw fit, and all expenses were to be borne

equally by the parties, with settlements to be made on the 15th of each month for the month preceding. Other details of operation were provided which are unimportant to this case.

Thereafter, on April 21st, the parties, that is, Smitherman and the Gilliland Oil Company, entered into a second agreement, in which it was stipulated that the former, "for the consideration hereinafter set forth * * *, does by these presents, sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty" to the latter, "its successors and assigns", an undivided one-half interest in the forty acres on which the discovery well was located, the said well and all equipment, the oil, etc., and "a like interest in and to the drilling well known as Taylor No. 4, subject, however, to the obligation of the assignee to pay and discharge one-half of the costs and expense of drilling said well * * *". The consideration stated was $600,000.00, "cash in hand paid * * *", the receipt of which was acknowledged. It was further provided that "all conditions between the parties" should extend to their heirs and assigns.

On April 23, 1921, which was also within the thirty day period provided by the revenue law of that time for a revaluation for depletion, another agreement was made with The Ohio Oil Company covering the remaining 120 acres of the northwest quarter of the northwest quarter of Section 14, Township 23, Range 8 West, known as the Anna Taylor tract. The contract recited that Smitherman, for the consideration expressed, did "sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights or actions of warranty", the said 120 acres. The price stipulated was $3,000,000.00, "cash in hand paid * * *, and the obligation of said The Ohio Oil Company to pay over and deliver

unto the assignor, his successors and assigns,
76 the sum of $1,000,000.00 out of one-half of the first oil produced * * * subject to the further obligation * * * to pay over and deliver into said assignor, his heirs, executors and assigns, the equal one-eighth of all oil produced * * * as an excess royalty." Provision was also made with respect to casing head gasoline, and for settlement on the 15th of each month.

The $3,000,000.00 was paid in cash and the additional $1,000,000.00 was subsequently received from the proceeds of one-half of the oil, as agreed.

Simultaneously with the execution of the agreement, there was delivered to Smitherman the following letter from The Ohio Oil Company:

"With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred and twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North Ranges 7 and 8 West, and in Twp. 23, North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender, or cancel all or any part of any one or all of said leases then before effecting such release or cancellation, such lease or leases, or part or parts thereof will be first offered to you, and if you shall request, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors."

Subsequently, on July 12, 1921, Smitherman and The Ohio Oil Company executed a further contract, providing for the gathering, storing and disposing of the one-eighth royalty which had been reserved by

the former and for the conveyance to Smitherman of one-eighth of the interest held by The Ohio Oil Company in certain other leases, including tanks erected thereon, upon the payment of $1500.00 cash and one-eighth of the expenses incident to erecting the tanks. Further stipulations were made for the marketing of Smitherman's one-eighth interest in the oil, covering the construction of switch tracks, for the giving of division orders and declaring that the company should not be responsible to Smitherman for his
77 portion of any oil lost by evaporation, fires, etc.

The plaintiff in this case was also a member of the George O. Baird Partnership. Baird, acting on behalf of himself and associates, acquired a lease on a tract of land in the Homer field of Claiborne Parish, and discovered oil thereon on August 23, 1919. The Commissioner of Internal Revenue recognized his right to the benefits of depletion. On December 10th of the same year, he made a contract to sell the property to one J. Rogers Flannery, for the price of $2,500,000.00, under terms and conditions which required the execution of a transfer, after the payment of a certain portion of that price. A first payment of $350,000.00 was made, but the contract was not otherwise performed, and suit was brought by Baird for its annulment. On January 9th, 1921, the state Court rendered judgment annuling the agreement, on condition that the $350,000.00 paid by Flannery should be returned to his assignee, John Munhall, Jr.

On November 16th, 1920, Baird made an agreement with the Gulf Refining Company of Louisiana, reading as follows:

"This agreement between George O. Baird, husband of Estella Mitchell, a resident of Caddo Parish, Louisiana; and the Gulf Refining Company of Louisiana, a corporation under the laws of the State of Louisiana, and domiciled at Orleans Parish, witnesseth:

"1. That said Baird is the owner of an oil and gas lease covering all of the S½ of the NE¼ of Section 24, Township 21 North, Range 8 West, less the West 30 acres thereof; and less also about one (1) acre in a square in the southwest corner of said described property, as to which one acre, however, the said Baird is the owner of an undivided one-half (½) interest, the Gulf Refining Company of Louisiana being the owner of the other undivided one-half interest in the lease covering the said one acre; the lease above referred to including the Eleven (11) oil wells on the said property, all the equipment thereto annexed and attached, together with the interest of the said Baird in the one well located on said one acre tract hereinabove referred to."

78 "2. For and in consideration of the obligations and agreements hereinafter set out, the Gulf Refining Company of Louisiana has obligated itself and does hereby agree to take possession of the said lease, to equip same properly at its own expense, and to operate such wells diligently for the production of oil, and to maintain the said production as long as oil may be produced therefrom in paying quantities; all such equipment and operation to be at the entire expense of the Gulf Refining Company of Louisiana and free from any expense whatsoever to the said Baird. And all taxes of every character legally assessed and charged against said lease, including all severance tax on the production therefrom, except as to the royalty interests, shall be paid by the Gulf Refining Company of Louisiana."

"3. For and in consideration of the obligation of the Gulf Refining Company of Louisiana, to equip and to operate said property free of expense to him, the said George O. Baird agrees that the Gulf Refining Company of Louisiana may retain from the production

of the said property, forty percent (40%) of the oil produced therefrom, the agreement between the parties being that out of the said 40 per cent so retained by the Gulf Refining Company of Louisiana, the Company shall deliver the royalty of one-eighth (1/8) of the oil, as provided for in the lease covering said property, and shall in addition deliver to the said Baird for a term of three (3) years, beginning the 1st day of November, 1921, one-twenty-fourth (1/24) of all the oil that may be saved from that produced from the said property, the said delivery to be made in the same manner in which the royalty is to be delivered to the lessors, under the provisions of the original lease."

"4. In consideration of this obligation and agreement, as hereinabove set out, the Gulf Refining Company of Louisiana shall have, however, the right to all of the gas, including casing-head gas, extracted from the wells on the said property, and all profits therefrom accruing, subject to such contracts as it may be able to secure from the lessors of the said property, and free from any obligation to account to the said Baird for any of the said gas or any of the profits derived from its manufacture or sale."

"5. The Gulf Refining Company of Louisiana has this day loaned to the said George O. Baird, the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, on the sole security of the said lease, without any personal liability. And, in order to secure the repayment of the said sum within thirty (30) months from this date, the said Baird has, and does by these presents, mortgage and hypothecate unto the said Gulf Refining Company of Louisiana, all of his right, title and interest thereto, and, in addition to further secure said obligation, pledges unto the said Gulf Refining Company of Louisiana, all of the oil that may

be saved from that produced from the said leased lands, after the delivery of the royalty of one-eighth (1/8) to the lessors, and the one-twenty-fourth (1/24) to the said Baird, as hereinabove provided."

79 "It is distinctly agreed and understood, however, that the Gulf Refining Company of Louisiana will, as hereinabove set out, deliver to the said Baird sixty percent (60%) of the oil produced from the said property, notwithstanding the said mortgage and pledge and free from any claim thereunder, until the said Baird shall have received at the market price prevailing on the date of delivery, from the said production sufficient oil to yield him, and at which price he will be able to sell said oil, the sum of Three Hundred and Twenty-five Thousand ($325,000.00) Dollars, from the 60 percent (60%) of the oil produced from the said property, which the said Gulf Refining Company of Louisiana has under this agreement obligated itself to deliver."

"After the said Baird shall have received from the 60 percent of the oil so delivered to him the sum of $325,000.00, or after the expiration of the 30 months from this date, if the said Baird shall not have received such amount from the said production within that time, then the Gulf Refining Company of Louisiana shall have the right to apply such 60 percent of the oil, or the proceeds thereof, to the repayment of the said loan until same shall have been paid out in full, without interest."

"6. In consideration of the obligations and agreements hereinabove entered into on the part of the Gulf Refining Company of Louisiana, the said Baird now agrees and obligates himself that whenever there shall have been produced from the said property by the Gulf Refining Company of Louisiana, such quantity

of oil that the 60 percent which the said Gulf Refining Company of Louisiana has agreed herein to deliver to him, shall have produced the sum of Six Hundred and Seventy-five Thousand ($675,000.00) Dollars (the first $325,000.00) of the proceeds of the sale of such oil to be retained by Baird as above provided; and the remaining $350,000.00 to be retained by said company, to be applied by it to the liquidation of the indebtedness above set out, that he will then sell, assign, convey, and deliver to the said Gulf Refining Company of Louisiana the entirety of the said mineral lease hereinabove referred to and forming the subject matter of this contract, for the consideration of the obligation upon the part of the Gulf Refining Company of Louisiana to continue to operate said property for the production of oil therefrom in paying quantities, and to deliver to him, or his transferees, the one-twenty-fourth (1/24th) royalty out of the oil, as hereinabove provided, until the expiration of three (3) years from this date, and a royalty of one-thirty-second (1/32nd) of all the oil that may be saved from that produced, after said date, and as long thereafter as oil may be produced from the said property in paying quantities."

"7. As further security to the Gulf Refining Company of Louisiana, for the performance of the obligation to sell as set out in the last preceding paragraph, the said Baird has this day executed an assignment in favor of his entire interest in the said lease, which said assignment he agrees to deposit in escrow with such depositary as may be mutually agreed upon by the parties, to be retained by said trustee and to be delivered to the Gulf Refining Company of Louisiana, when it shall have complied with the obligations above set out and made a consideration of said assignment; said assignment so delivered in escrow shall moreover be considered between the parties as a further security for the pledge and mortgage hereinabove stipulated."

"In witness of which, this agreement has this day been executed in duplicate, the said Gulf Refining Company of Louisiana being represented therein by its Third Vice-President, C. R. Minor, being herein authorized, and this agreement being executed as of and effective from seven-thirty o'clock A. M., November 1, 1921, Shreveport, La., Nov. 16th, 1921."

As required by this agreement, the $350,000.00 was paid by the Gulf Refining Company of Louisiana, to Munhall and none of it was actually received by Baird.

The Gulf Company took charge of the property and a deed was executed and placed in escrow, as stipulated but was not delivered until 1927. During the years 1921 and 1922 the contract was performed according to its stipulations.

The plaintiff made a timely return of his income taxes for the year 1921, including therein his distributive shares in both the Smitherman Special Account and Geo. O. Baird partnerships, deducting therefrom as depletion, based, as to the former, upon a claimed discovery value applying both to the cash bonuses and royalties received, and in the latter partnership, depletion was claimed on the revaluation previously determined by the Commissioner. Plaintiff also omitted as income the $350,000.00 paid by the Gulf Refining Company of Louisiana to Munhall.

For 1922, similar returns were filed and deductions for depletion were made.

The claims for depletion were disallowed by the Commissioner, who also increased the net income by adding the $350,000.00 paid to Munhall. The plaintiff in this case on January 4, 1927, paid, under protest, his proportion of the taxes interest and penalties resulting from this additional assessment by the Commissioner, and made timely claim for a
81 refund thereof on May 4, 1928, which was rejected.

The principal contention on the part of the Commissioner is that the agreements between Smitherman, the Gilliland Oil Company and The Ohio Oil Company in the one instance, and between Baird and the Gulf Refining Company in the other, were all assignments or sales of the interests of the partnerships in the leases; while the taxpayer claims that they were subleases, entitling him to depletion during both years, based upon discovery value.

There is an additional issue of whether, in the Baird partnership, the Commissioner was correct in assessing as income, the $350,000.00 paid to Munhall as Flannery's assignee.

It is conceded in the brief of plaintiff that the transfer to the Gilliland Oil Company was not a sub-lease. It is necessary, therefore, to consider only the transactions had between Smitherman and The Ohio Oil Company in the one instance, and between Baird and the Gulf Refining Company in the other. There are really three aspects to be considered in the claim for depletion in the Smitherman-Ohio Oil Company transaction: (1) As to the $3,000,000 paid in cash at the signing of the agreement; (2) the $1,000,000 paid out of one-half of the first oil produced; and (3) the over-riding royalty of one-eighth.

I think I may say, from the arguments of both sides, that Smitherman, who was the original lessee, holding seven-eighths of the minerals which might be produced from the lands, would have been entitled, after discovery, had he developed the property himself, to such a rate of depletion throughout the life of production as would, when the minerals had been exhausted, have returned to him the fair market value of his interest in the leases at the time of discovery, or within thirty days thereafter. This appears to have been the clear intent and purpose of the revenue law.

In those states where the lease or other conveyance of minerals is recognized as a sale or transfer of an

interest in the land, sums received as bonuses, fall within the category of capital gain, to be as-
82 sessed at the flat rate of 12½% upon income derived from that source. See Ferguson vs. Commissioner of Internal Revenue, 45 Fed. (2nd) 573, (C. C. A. Fifth). As was said in the case just cited, the amendment to the revenue law differentiating that class of income and subjecting it to a flat rate of taxation, was to promote trade and to relieve the taxpayer from the heavy burden of the high rates of income taxes upon the proceeds of a capital asset. Of course this does not affect directly the question of whether or not, in a situation like the present one, the tax payer is entitled to depletion, but it does serve to illustrate the point that Congress, in the opinion of the Court, was seeking to subject to ordinary income taxation profits from trade, business and industry, and to avoid imposing it upon capital assets, except to the limited extent thus provided. That the enhanced value of property, whether it be land or mineral leases, resulting from the discovery of a rich oil pool, becomes a capital asset, which does not bear income taxes until it has been realized, either through production or conveyance of some part of such property, and then only subject to these statutory advantages, seems beyond question. Therefore, to relieve from those burdens the taxpayer, who is fortunate enough to own property in a state like Texas, or who has means to himself develope and produce the minerals while imposing them upon one in a situation like the plaintiff, works a discrimination which should not be attributed to the law-making body except it be required by clear and inescapable provision of the revenue law.

As to the lessor, the Treasury Department recognizes the right to depletion upon bonuses or advanced royalties. That is provided for in Art. 215 of Regulation 62 of Art 216 of Regulation 65 (Treasury Decision 3938) from which quotation is made as follows:

"Art 216 (215) Depletion.—Adjustment of Accounts based on bonus for advanced royalty. (a) Where a lessor receives a bonus in addition to royalties, there shall be allowed a depletion deduction, in respect of the bonuses, an amount equal to the proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of the royalties thereafter received."

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Hence, if the owner of the land or original lessor had himself discovered the minerals and had leased the property to The Ohio Oil Company, receiving the bonuses paid to the plaintiff here, and retained the customary one-eighth royalty, under the Treasury Department's own regulations and method of determining the tax to be paid, he would undoubtedly have been allowed depletion, in conformity with the above quoted formula, for the bonuses paid in cash, and by the same token, would have received similar allowance upon the additional sum subsequently paid out of one-half of the first oil produced. Had such owner sold for a lump sum the land, or the whole of the mineral interest, he would have been entitled to report and be taxed upon the discovery value as a capital gain. Under the above method of calculation, the Treasury Department (as to an owner) treats the matter as a present depletion or exhaustion pro tanto of 7/8's of the capital value (including discovery value on the basic date), by discounting the amount of such bonus, so that the sum presently allowed will be the equivalent of what would have been received over the estimated life of production, and to which is added by return through deduction from year to year, the esti-

mated value as of the basic date of the remaining one-eighth reserved as royalty. The result is to ultimately return to the taxapyer the full amount of the cost of the property plus discovery value as determined under the statute.

Actually, in this state the lessee's seven-eighths' interest in the minerals, when he comes to make a conveyance thereof and retains an overriding royalty, is not different (except that he does not own the land but an exclusive right to enter and withdraw
84 the minerals) from a practical standpoint to that of the lessor or owner of the land. The latter has no right under a lease (except for default by the lessee) to a return of the property until the minerals have been exhausted. It has been held that this circumstance, i. e., the right to a reversion of the land from which the minerals have been removed, is no reason for sustaining the right to depletion in favor of the land owner as against that of the lessee, who has an interest in the mineral production by virtue of an over-riding royalty. See Lynch vs. Alworth-Stephens Company, 267 U. S. 368. Under the law of Louisiana, the extent of the property interest conveyed by the landowner and that passing by an assignment from a lessee, is the same, that is, a right in the nature of a real servitude, giving to each transferee the exclusive right to enter upon, explore for, produce and reduce to possession the minerals. Frost-Johnson Lumber Company vs. Sallings' Heirs, 150 La. 855. There is no more reason in logic or law, for treating the cash bonus received by the owner of the land for the undivided portion of the interest conveyed, as advanced royalties, subject to depletion, than there is in the case of a lessee who makes a similar conveyance of only a part of his seven-eighths leasehold. I repeat that the nature of the title to the minerals under the law of this state, in each instance, is identical, whether the transfer be by what is termed a sale, assignment or sub-lease.

Running through the logic of all the cases which I have been able to find, as well as the regulations and decisions of the Treasury Department, the important element in determining the right to depletion appears to be the retention of an interest in the minerals which remain to be produced.

Counsel for the plaintiff argue that the issue turns upon the point as to whether the transfers amount to a sub-lease under the civil law of this state, as distinguished from the principles of common law. While I think the distinction contended for clearly exists, still to my mind it makes no difference what the conveyances are called, the all-important fact is that the plaintiff retained a definite and valuable interest in the property (the minerals) represented by his overriding royalty, which supplies the essential element entitling him to depletion, both under the regulations of the Treasury Department and the decisions of the Supreme Court. Lynch vs. Alworth-Stephens Company, supra.

85

As I attempted to point out in a dissenting opinion in the case of Herold vs. The Commissioner of Internal Revenue, 42 Fed. (2nd) 945, the statute (Sec. 14-a, (10) of the Revenue Act of 1921) does not distinguish or in my judgment, authorize the distinction, as between lessors and lessees, which the ruling of the Commissioner in this case has made. It declares:

"That in computing net income, there shall be allowed as deductions:

* * * In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion * * * according to the peculiar conditions in each case, based upon cost * * * in the case of mines, oil and gas wells discovered by the taxpayer * * * where the fair market value of the property is disproportionate to the cost, the depletion and allowance

shall be based upon the fair market value of the property at the date of discovery, or within thirty days thereafter * * *"

The exclusion of the lessee from the benefits of these provisions is based upon a process of reasoning and interpretation which, in my opinion, is not only not supported by anything in the section itself, but is contrary to the spirit and purpose behind its enactment. Common law authorities are cited which are not applicable in Louisiana. The Department itself, I think, recognized this underlying purpose in the Manual of Instructions which it furnished to the industry under the Act of 1918, as appears from the following is quoted:

86 "The Clause from Sections 214 (a) and 234 (a) of the tax law referred to above was inserted to protect the prospector or "wildcatter" who goes into an unknown field and overcoming hazards of the business discovers a new and valuable deposit of oil or gas, and by so doing increases the value of his holdings to such an extent that their value at the time of discovery or within thirty days thereafter is materially disproportionate to their cost. The discovery may refer to the opening up of a new pool or field or it may refer to the tapping of a new and previously unknown sand or zone in an old pool or field. The benefits, however, will accrue solely to the holdings of the taxpayer actually making the discovery. And it will affect him only in so far as he is able to prove that his discovery was bona fide, and that it has so increased the value of his holdings as to make it materially disproportionate to the cost."

The view which I have expressed above applies with whatever force it may have whether the property be situated in this state or elsewhere. However, as stated

heretofore, I think there is a clear distinction between the common and civil law as to what constitutes a sub-lease. Under the former, there appears to be support for the proposition that there must remain some reversionary interest in the sub-lessor; but this is not necessary in Louisiana, where the civil law obtains. It is true that in Smith vs. Sun Oil Company, 165 La. 907, 116 Sou. 379, there was an express provision for forfeiture in event of the failure of the transferee to comply with the obligations in favor of the lessee, but this stipulation had the effect merely of writing into the contract that which the codal provision supplied without it.

Under the common law, a lease is considered a partial alienation of the fee, with a reversion to the lessor. R. C. L., Vol. 16, p. 619, verbo Landlord & Tenant, Sec. 100. On the other hand, estates in reversion and remainder are unknown to the Louisiana law. Therefore, in the common law states, as settled by that system, there must always be in a contract of lease, provision for reversion, express or implied, of some part of the estate, (in the case of minerals alone, a portion of the mineral estate as distin-
87 guished from the land). Hence, a lessee who transfers the whole of his leasehold estate, reserving nothing in reversion for himself, does not become a sub-lessor, even though he receives a greater or different yearly or monthly consideration therefor. Whereas, with us, the very nature of a mineral contract, whether it be in the form of sale, assignment or lease, is such as to convey only a right upon the property and not a title or estate in the minerals themselves.

Our Revised Civil Code defines a lease as follows:

"Article 2669. Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price."

"Article 2674. To let out a thing is a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing during a certain time for a certain stipulated price which the other binds himself to pay him."

The main difference between a lease and a sale or alienation in this state, is that the former gives only the right of enjoyment for the specified period, while the latter vests an ownership or interest in the fee, with the consequence that in the former the lessor warrants or obligates himself to the lessee for the full enjoyment of the premises, even to the extent of necessary repairs and liability for damages for violation of such warranty; while in a sale or alienation any loss from those sources short of eviction, is at the risk of the vendee or alienee. See Knapp vs. Guerin, 144 La. Rep., 754 and authorities therein cited; see also La. R. C. C., Arts. 2711 and 2729.

At common law, a conveyance of mineral rights which does not expressly stipulate a reversion, falls into the category of a sale or assignment, and cannot be construed as a sub-lease. In Louisiana, regardless of the terms used, if the lessee conveys anything less than the whole of his rights, and stipulates that the transferee shall pay him a rental, which
88 is the same under our law as royalty, whether for the whole term or less, the result is to create a sub-lease, with all of the rights incident thereto, such as a lessor's lien and right of pledge, action to annul, etc. Batallion Washington Artillery vs. Schwartz, 161 La. 925; Smith vs. Sun Oil Company, supra; Spence vs. Lucas, 138 La. 763; Logan vs. State Gravel Company, 158 La. 105; Board of Commissioners vs. Pure Oil Company, 167 La. 801.

George O. Baird Partnership.

The Court of Appeals for this circuit, in the case of Herold vs. Commissioner, 42 Fed. (2nd) 943, in-

volving the same contract and issues out of which plaintiff's present claim arises, held that the George O. Baird Partnership could not be charged with the $350,000 paid by the Gulf Refining Company to Munhall, assignee of Flannery. As one of the Judges participating therein, I concurred and still believe the conclusion correct. Otherwise, the dissenting opinion which I filed in that case expresses the views which I still entertain with respect to the $325,000 which was to be paid in oil, and the overriding royalties retained by Baird.

However, the claims for depletion as to both of the partnerships herein have been decided by the Court of Appeals of this circuit contrary to the views above expressed. Waller vs. Commissioner, 40 Fed (2nd) 892; Herold vs. Commissioner, supra. For this reason, I feel bound to follow those rulings until that Court or the Supreme Court reaches a different conclusion.

The plaintiff is entitled to recover his proportionate share of the income taxes assessed against the $350,000 paid by the Gulf Refining Company to Munhall, but otherwise his demand must be rejected.

89 Proper decree may be presented. The rights of all parties are reserved to present and have settled their exceptions.

Done and signed on this the 25th day of February, A. D. 1931, at Shreveport, Louisiana.

BEN C. DAWKINS,
U. S. D. J.

Court's Opinion. Filed March 4, 1931.

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90 (Title Omitted.)

Comes E. G. Palmer, plaintiff, through counsel, and without in any manner acquiescing in the findings of

the Court which deny him judgment as prayed for, files in connection herewith a computation of the judgment to be rendered herein based on the opinion and findings of the Court heretofore handed down, and respectfully shows:

1.

That the amount of the judgment has been computed in accordance with the opinion and findings of the Court heretofore handed down herein, as will appear from the computation attached hereto and made a part hereof; and that he herewith tenders a judgment based on such opinion, findings and computation.

2.

That the sixty day letter from the Commissioner of Internal Revenue made the basis for the assessment of additional income taxes against your petitioner, Exhibit V, and the sixty day letter addressed to the George O. Baird Partnership, Exhibit F, show that there was included for the year 1921 in the income of the George O. Baird Partnership the sum of $350,000.00, reflected in the income of petitioner, as one of the partners thereof, which sum this Court has ordered stricken out as income to the said partnership.

3.

That the said sixty day letters likewise show the allowance of the sum of $96,114.90 for the year 1921, as a deduction to said partnership on account of the extinguishment of capital investment, arising out of the transactions of the said partnership involved in this suit.

4.

That as a result of the allowance of the deduction of $350,000.00, ordered by the Court herein, the sum

allowed by the Commissioner for the extin-
91 guishment of capital investment is necessarily to be returned to the partnership as oil payments are made on account of the $325,000.00 accruing to it under the contract with the Gulf Refining Company, dated November 16, 1921, and appearing herein as Exhibit Y, which is involved in this suit.

5.

That by stipulation filed herein, it appears that the sum of $22,983.06 was received by said partnership from such oil payments in the year 1921, and the sum of $181,765.25 was received by it from the same source in the year 1922.

6.

That the allowance of $96,114.90 for the extinguishment of capital investment made to the said partnership, reflected in the income of petitioner, and shown by the sixty day letters above referred to, is therefore returnable to the partnership, and consequently to petitioner as the said oil payments were received. The amounts to be so returned, based on the opinion and findings of the Court herein and the computation made in accordance therewith, are as follows:

$22,983.06 in 1921.
$73,131.84 in 1922.

7.

That there has been a stipulation filed herein that timely claims for refund were filed by petitioner, properly setting forth the same bases as are made the bases for plaintiff's petition herein; that the claims for refund filed herein by stipulation fully, completely

and in detail show all matters arising out of the transactions of the George O. Baird partnership involved herein.

8.

That the transactions of the George O. Baird partnership, Exhibit Y, which is one of the subject matters of this suit, continued over both 1921 and 1922, both of which taxable periods are involved in this suit; and that the computation made and the allocation of the amount allowed by the Commissioner as an extinguishment of capital investment has properly been distributed in the years 1921 and 1922, as
92 the sums from oil payments were received in those two taxable periods.

Wherefore, he prays that this his computation of the amount of the judgment to be rendered herein, in accordance with the opinion and findings of the Court, be approved, and that the judgment tendered herewith be approved as in accordance therewith.

FRED R. ANGEVINE,
DART AND DART,
SMITHERMAN, TUCKER AND MASON,
Attorneys for plaintiff.

Approved:
BEN C. DAWKINS, Judge.

Filed June 19, 1931.

93 Recomputation of 1921 Income Tax of Langston Lease, Based on Decision of the District Court of the United States for the Western District of Louisiana, E. G. Palmer vs. Jacob O. Bender, Collector, Docket No. 1904, Mandate February 25, 1931.

	Total.	Geo. O. Baird Partnership.	Mrs. Thigpen and Mrs. Herold.	Thigpen, Herold, Baird and Palmer.
Income from Operations per 60 day letter dated December 21, 1926	$146,399.02	$41,122.41	$21,206.85	$84,069.76
Net Income from Sale of Langston Lease per 60 day Letter of December 21, 1926..	$253,885.10	$141,496.78	$70,748.40	$41,639.92
Less Amount not to be considered as Income, per Mandate	350,000.00	175,000.00	87,500.00	87,500.00
Add Extinguishment of Investment Returnable in 1922..	73,131.83	22,011.68	11,005.84	40,114.31
Net Income from Sale of Langton Lease—Corrected (Loss)	2,983.07)	(11,491 54)	(5,745.76)	(5,745.77
Total Net Income Corrected..	$123,415.95	$29,630.87	$15,461.09	$78,233.99

Mr. and Mrs. S. L. Herold....	$33,237.71	$ 5,926.17	$ 7,730.54	$19,581.00
Mr. and Mrs. J. A. Thigpen..	33,237.72	5,926.17	7,730.55	19,581.00
Mr. and Mrs. E. G. Palmer...	25,507.17	5,926.17	.....	19,581.00
Mrs. J. K. Findley	5,926.18	5,926.18	.....	.....
Mr. and Mrs. Geo. O. Baird...	25,507.17	5,926.18	.....	19,580.99
	$123,415.95	$29,630.87	$15,461.09	$78,232.99

94 Recomputation of 1922 Income Tax of Langston Lease, Based on Decision of the District Court of the United States for the Western District of Louisiana, E. G. Palmer vs Jacob O. Bender, Collector, Docket No. 1904, Mandate February 25, 1931.

	Total.	Geo. O. Baird Partnership.	Mrs. Thigpen. and Mrs. Herold.	Thigpen, Herold, Baird, and Palmer.
Net Income from Operations, per 60 Day Letter dated December 21, 1926.....	$146,870.29	$73,156.64	$37,363.67	$36,349.98
Less Extinguishment of Investment Returnable in 1922	73,121.83	22,011.68	11,005.84	40,104.31
Net Income Corrected.....	$73,748.46	$51,144.96	$26,357.83	Loss (3,754.33)

Mr. and Mrs. S. L. Herold...	$22,469.32	$10,228.99	$13,178.91	Loss (938.58)
Mr. and Mrs. J. A. Thigpen..	22,469.32	10,228.99	13,178.92	Loss (938.59)
Mr. and Mrs. E. G. Palmer..	9,290.41	10,228.99	.....	Loss (938.58)
Mrs. J. K. Findley.....	10,228.99	10,228.99	.....	.....
Mr. and Mrs. Geo. O. Baird.	9,290.41	10,228.99	.....	Loss (938.58)
Totals	$73,748.46	$51,144.96	$26,357.83	Loss ($3,754.33)

E. G. Palmer.

Computation of Tax After Giving Effect to Adjustment on the Income From the Langston Lease, Based on Decision of the District Court of the United States for the Western District of Louisiana, E. G. Palmer vs. Jacob O. Bender, Collector, Docket No. 1904, Mandate February 25, 1931.

1921.

Net Income per Treasury Department Letter December 21, 1926 .... $436,571.41

Adjustment: Langston Lease:

	Income T. D. Letter 12-21-26.	Income Corrected.	Income Decreased.
Geo. O. Baird Partnership....			
Thigpen, Herold, Baird and	$36,515.84	$5,926.17	$30,589.67

Palmer	31,427.42	19,581.00	11,646.42	
Totals	$67,943.26	$25,507.17	$42,436.09	
Income Decreased			$42,436.09	
One-half for Community Property				21,218.05
Net Income Adjusted				$415,353.36

Computation of Tax.

Net Income Adjusted	$415,353.36	
Less: Dividends and Examinations	6,152.37	
Amount Subject to Normal Tax.....	$409,200.99	
Amount Taxable at 4%	$ 4,000.00	$ 160.00
Amount Taxable at 8%	405,200.99	32,416.08
Amount Subject to Surtax	55,228.28	27,947.34
Amount Subject to Article 13 at 20%.....	360,125.08	72,025.02
Total Tax Due		$132,548.44

Computation of Surtax.

Surtax on Total Income of $415,353.36	$210,182.61	
Amount Subject to Surtax	55,228.28	
Amount Subject to Article 13	360,125.08	
Surtax—55,228.28 x 210,182.61 —	27,947.34	
415,353.36		
Total Tax Due		$132,548.44
Tax Paid		141,714.05
Overassessment		$ 9,165.61
Refund of Interest paid:		
9165.61 x 37,080.50 (interest paid December 31, 1926)		
129,138.75		2,631.74
Total overassessment and Refund of Interest		$11,797.35

Computation of Tax After Giving Effect to Adjustment on the Income From the Langston Lease, Based on Decision of the District Court of the United States for the Western District of Louisiana, E. G. Palmer vs. Jacob O. Bender, Collector, Docket No. 1904, Mandate February 25, 1931.

1922.

Net Income per Treasury Department Letter December 21, 1926				$119,178.30
Adjustment: Langston Lease:	Income T. D. Letter 12-21-26.	Income Corrected	Income Decreased.	
Geo. O. Baird Partnership....	$14,631.33	$10,228.99	$ 4,402.34	
Thigpen, Herold, Baird and Palmer	9,087.50	Loss (938.59)	10,026.09	
Totals	$23.718.83	$9,290.40	$14,428.43	
Income Decreased			$14,428.43	
One-half for Community Property				7,214.22
Net Income Adjusted				$111,964.08

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Computation of Tax.

Net Income Adjusted		$111,964.08	
Exemption	$1,400.00		
Dividends	6,605.41		
Interest on U. S. Obligations	3,229.19	11,234.60	
Amount Subject to Normal Tax		$100,729.48	
Amount Taxable @ 4%		$ 4,000.00	$ 160.00
Amount Taxable @ 8%		96,729.48	7,738.28
Surtax on		111,964.08	28,202.76
Tax Due			$36,101.04
Tax Paid			40,105.06
Overassessment			$4,004.02
Refund of Interest paid: 4004.02 x 8747.37 (interest paid December 31, 1926) 37,971.17			922.41
Total Overassessment and Refund of Interest			$4,926.43

97

JUDGMENT.

(Title Omitted.)

The above numbered and entitled cause having been regularly tried before the Court, pursuant to stipulation in writing waiving jury, and the Court having filed its findings of fact and conclusions of law, for reasons given in the written opinion, the law and evidence being in favor thereof,

It is hereby ordered, adjudged and decreed that there be judgment herein in favor of the plaintiff, E. G. Palmer, and against the defendant, Jacob O. Bender, Collector of Internal Revenue for the District of Louisiana, in the full sum of $11,797.35, being overpayment of income taxes of $9,165.61 and interest paid thereon of $2,631.74, for the year 1921, and $4,926.43, being overpayment of income taxes of $4,004.02, and interest paid thereon of $922.41 for the year 1923, with interest from January 4, 1927, as provided by law, together with costs actually incurred for witnesses and summoning the same and fees paid the Clerk of Court, which are hereby taxed in the sum of $17.00.

The Court hereby certifies that there was probable and reasonable cause for the act of defendant, the Collector of Internal Revenue for the District of Louisiana, in demanding and collecting from the plaintiff the Internal Revenue tax for the refund of which this judgment is rendered.

Thus done, read aloud and signed in open Court, in Shreveport, Louisiana, on this 19 day of June, 1931.

BEN C. DAWKINS,
Judge.

Filed June 19, 1931.

98 MOTION FOR EXTENSION OF TIME TO PRESENT AND SETTLE EXCEPTIONS.

(Title Omitted.)

Comes E. G. Palmer, plaintiff, through counsel, and respectfully shows:

That the opinion of this Honorable Court was rendered on March 4, 1931, and that the proper decree in conformity therewith is presently being computed and adjusted between the parties hereto, in accordance with the instruction of Court and their stipulation so to do.

That there was reserved in the opinion to all parties the right to present and have settled their exceptions; that on March 13, 1931, plaintiff was granted sixty days for that purpose;

That due to the time required to compute and agree as to the decree to be rendered herein, in accordance with the opinion of the Court, additional time is required to present and have settled his exceptions.

Wherefore, he prays that he may be granted sixty days additional within which to present and have settled his exceptions.

FRED R. ANGEVINE,
SMITHERMAN, TUCKER & MASON,
Smitherman, Tucker & Mason,
Attorneys.

I hereby certify that the above motion is filed in good faith and not for the mere purpose of delay.

JOHN H. TUCKER, JR.
John H. Tucker, Jr.

I have no objection to the foregoing application.
Shreveport, La., Aprl. 28, 1931.

PHILIP H. MECOM,
U. S. Attorney.

99 ORDER.

The foregoing considered, plaintiff is hereby granted sixty additional days, dating from the expiration of the sixty day period heretofore granted for the same purpose on March 13, 1931, for the presentation and settlement of his exceptions.

Done and signed in Shreveport, this 29 day of April, 1931.

BEN C. DAWKINS,
Judge.

Filed May 1, 1931.

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100 BILL OF EXCEPTIONS No. 1.

(Title Omitted.)

Be it remembered, that on July 16, 1930, at the conclusion of the trial hereof, plaintiff filed a motion for judgment in his favor as prayed for in his petition, and a request for findings of fact and conclusions of law, which the Court took under advisement, and on June 10, 1931, found all facts as requested by plaintiff, which requested findings of fact and rulings thereon are as follows:

"Now comes the plaintiff, E. G. Palmer, by his attorneys, John H. Tucker, Jr., and Fred R. Angevine, and considering the facts hereinafter set forth to be proved and deeming them material to the presentation of this case, requests the Court to specifically find the following facts and conclusions of law separately stated:

1. That E. G. Palmer, plaintiff, a resident of Shreveport, Louisiana, duly filed with Jacob O. Bender, defendant, Collector of Internal Revenue for the District of Louisiana, his income tax return for the year 1921. On March 13, 1922, and for the year 1922, on February 20, 1923; the returns being filed herein as Exhibits "T" and "U."

Granted.

2. That E. G. Palmer is, and was at all times mentioned in plaintiff's petition, the husband of Mabel Mitchell Palmer, and being a resident of the State of Louisiana, and under the community of acquets and filed said income tax returns for one-half of the income accruing to such community for the years in question on a community property basis.

Granted.

3. That this controversy arises out of matters in connection with the interests owned by petitioner in the partnership known as "J. E. Smitherman, Special Account," and the George O. Baird Partnership, and involves income taxes for the years 1921 and 1922, all of which is specifically set forth hereafter.

Granted.

101 Matters Arising Out of the "J. E. Smitherman, Special Account" Partnership. (Par. 4 to 20 Inc.)

4. That early in the year 1919, J. E. Smitherman and his associates, of whom petitioner was one, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed that if the said citizens would lease 15,000 acres of designated land in the vicinity of Haynesville to Smitherman and his associates, that the latter would pay a bonus of 50c per acre for such leases and drill a test well on the property within eight months after the execution and delivery of the leases.

Granted.

5. That during the year 1919, a partnership under the firm name of "J. E. Smitherman, Special Account," was formed, composed of the following partners, whose respective proportionate interests are expressed in the percentages set opposite their names:

	Per Cent.
J. Y. Snyder	5
J. E. Smitherman	15-5/6
E. G. Palmer	15-5/6
Mrs. J. K. Findley	15-5/6
C. D. Keen	1-3/16
B. W. Marston	1-3/16
M. M. Morelock	2-3/8
Mrs. W. L. Beene	1-3/16
L. A. Beene	1-3/16
L. T. Waller	2-3/8
S. J. Beene	2-3/8
L. L. Beene	2-3/8
S. L. Beene	2-3/8
Baucum Brothers	2-9/16
Waller Bros. & Co.	4-3/4

"Now comes the plaintiff, E. G. Palmer, by his attorneys, John H. Tucker, Jr., and Fred R. Angevine, and considering the facts hereinafter set forth to be proved and deeming them material to the presentation of this case, requests the Court to specifically find the following facts and conclusions of law separately stated:

1. That E. G. Palmer, plaintiff, a resident of Shreveport, Louisiana, duly filed with Jacob O. Bender, defendant, Collector of Internal Revenue for the District of Louisiana, his income tax return for the year 1921. On March 13, 1922, and for the year 1922, on February 20, 1923; the returns being filed herein as Exhibits "T" and "U."

Granted.

2. That E. G. Palmer is, and was at all times mentioned in plaintiff's petition, the husband of Mabel Mitchell Palmer, and being a resident of the State of Louisiana, and under the community of acquets and filed said income tax returns for one-half of the income accruing to such community for the years in question on a community property basis.

Granted.

3. That this controversy arises out of matters in connection with the interests owned by petitioner in the partnership known as "J. E. Smitherman, Special Account," and the George O. Baird Partnership, and involves income taxes for the years 1921 and 1922, all of which is specifically set forth hereafter.

Granted.

101 Matters Arising Out of the "J. E. Smitherman, Special Account" Partnership. (Par. 4 to 20 Inc.)

4. That early in the year 1919, J. E. Smitherman and his associates, of whom petitioner was one, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed that if the said citizens would lease 15,000 acres of designated land in the vicinity of Haynesville to Smitherman and his associates, that the latter would pay a bonus of 50c per acre for such leases and drill a test well on the property within eight months after the execution and delivery of the leases.

Granted.

5. That during the year 1919, a partnership under the firm name of "J. E. Smitherman, Special Account," was formed, composed of the following partners, whose respective proportionate interests are expressed in the percentages set opposite their names:

	Per Cent.
J. Y. Snyder	5
J. E. Smitherman	15-5/6
E. G. Palmer	15-5/6
Mrs. J. K. Findley	15-5/6
C. D. Keen	1-3/16
B. W. Marston	1-3/16
M. M. Morelock	2-3/8
Mrs. W. L. Beene	1-3/16
L. A. Beene	1-3/16
L. T. Waller	2-3/8
S. J. Beene	2-3/8
L. L. Beene	2-3/8
S. L. Beene	2-3/8
Baucum Brothers	2-9/16
Waller Bros. & Co.	4-3/4

H. A. Longino & D. D. Goode	2/38
Claude Beene & C. E. Miller	3-9/16
J. C. McEachern	2-3/8
G. Y. Harris	2-3/8
R. G. Smitherman, Jr.	2-3/8
J. R. Bevill	1-3/16
A. H. Southern	3-9/16
J. C. Sherman	4-3/4
Total	100%

Granted.

6. The partnership acquired 26,000 acres of leases in the vicinity of Haynesville, Louisiana, in the name of J. E. Smitherman, in whose name all subsequent contracts in reference thereto were made.

Granted.

7. When the leases were acquired, the nearest production to the land leased was the Homer Field in Claiborne Parish, Louisiana, about 13 miles distant. Several wells were drilled on the leased premises in 1919, 1920 and 1921, but all were dry except that drilled in 1921.

Granted.

8. On March 30, 1921, the discovery well (known as Anna Taylor No. 2) was completed by the partnership as a producing oil well, with an estimated daily production of 7500 barrels. It was located 580 feet North and 330 feet West of the center of the Northwest quarter of Section Fourteen (14), Township Twenty-three (23) North, Range Eight (8) West, and the discovery area was located on four leases to the

partnership, namely, Anna Taylor et als, H. P. Camp and G. W. Taylor. These leases are shown as Exhibits "H," "I," "J" and "K."

Granted.

9. On April 23, 1921, and within 30 days after the discovery well was brought in, the partnership transferred to the Ohio Oil Company 120 acres of the 160 acres on which the well was located by the following instrument in writing (Exhibit N):

102 " "State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me Sam W. Mason, a Notary Public duly commissioned and sworn in and for said Parish and State, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled in the City of Findlay, County of Hancock, State of Ohio, herein appearing for the purpose of accepting this assignment through its agents and attorney in fact, O. D. Donnell, Vice President, duly authorized and empowered hereto by a resolution of the Board of Directors of said Company, a certified copy of which is attached hereto, and by reference made part hereof, the following described property situated in the Parish of Claiborne, State of Louisiana, and particularly described as follows, towit:

East half ($E\frac{1}{2}$) of Northwest quarter ($NW\frac{1}{4}$) and Southwest quarter ($SW\frac{1}{4}$) of Northwest quarter ($NW\frac{1}{4}$) of Section 14, Township 23 North, Range 8 West, containing one hundred twenty acres more or less.

To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigned.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of three million dollars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of the said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver unto said assignor, his heirs, executors and assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his heirs or assigns.

It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman,

his heirs and assigns, shall share in the profits derived from the one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plant and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

The appearers further declared that it is agreed and understood by and between them that the deferred payments to be made out of the oil, as well as settlements for the one-eighth (1/8) excess royalty herein above stipulated, shall be made on or before the 15th day of the month succeeding that during
103 which the oil is removed from the premises.

In witness whereof, the said James E. Smitherman and the said The Ohio Oil Company, acting through its said agent and attorney in fact, have hereunto signed their names in the presence of me, Notary, and E. G. Palmer and Mrs. R. T. Layne, two competent witnesses, at my office in the City of Shreveport, in said Parish and State on this 23rd day of April, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL CO.,
By O. D. DONNELL,
Vice-President.

Witnesses:
E. G. PALMER,
MRS. R. T. LAYNE.

SAM W. MASON,
Notary Public.' "

On the execution of which, the said Ohio Oil Company paid to the partnership a bonus or advanced royalty of Three Million ($3,000,000.00) Dollars, and agreed to pay an additional bonus or advanced royalty of One Million ($1,000,000.00) Dollars out of 1/2 of of the first oil produced and saved from the premises sub-leased, and an excess or overriding royalty of one-

eighth of the oil and gas produced and saved from the leased premises and reserved to sub-lessor the right to join with the sub-lessee in the manufacture of casing head gasoline from the wells drilled on said premises, and in connection therewith agreed with the partnership as follows: (Exhibit O and P).

'Memorandum of Agreement, made and entered into this 12th day of July, 1921, by and between James E. Smitherman, and the Ohio Oil Company, an Ohio corporation, hereinafter referred to as the Ohio, Witnesseth:

Whereas: By the terms of certain assignments from James E. Smitherman to the Ohio Oil Company conveying to said Company certain interest in oil and gas lease in Claiborne Parish, State of Louisiana, and in the County of Columbia, State of Arkansas, said instruments of assignment being recorded in Book 45, page 392, records of Columbia County, Arkansas, and in Book 28, page 15 to 25 inc., of the conveyance records of Claiborne Parish, La., the Ohio Oil Company agreed to pay over and deliver to the said Smitherman the equal one-eighth (1/8) part of all oil produced and saved from the premises so assigned. Now, therefore, this agreement to provide for gathering, storing and disposing of such one-eighth interest. In consideration of the sum of one dollar each to the other paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants herein contained it is agreed as follows:

First: The Ohio shall have control of said Smitherman one-eight interest, with the right to place in storage commingled with the Ohio's oil or any other oil that may be stored in such tanks from the Smitherman leases, for as long as it shall think wise, all or any part of said interest, and the right at any time to sell with the Ohio's portion of the oil, any part or all of such interest at the price the Ohio shall at the time be re-

ceiving for its oil run from the tank farm in the Haynesville, La., field, settlement for oil sold to be made on or before the 15th day of the month succeeding that in which the oil is so sold, such settlements to be made subject to any deductions that may be made by the Pipe Line Company at the time
104 the oil is run.

In consideration whereof the Ohio agrees, upon the payment to it by said Smitherman of the sum of fifteen hundred dollars ($1,500.00) to convey to Smitherman an undivided one-eighth (1/8) part of the interest acquired by it in and to the following described land: The Northwest quarter (NW¼) and the Northwest quarter of the Southwest quarter (NW¼ of SW¼) less 15 acres off of the South side of said last described tract, all in Section 13, Township 23 North, Range 8 West, Claiborne Parish, La., containing 185 acres, more or less, upon which are now being erected oil storage tanks, the Ohio reserving to itself however, the one one hundred and twenty-eighth (1/128) royalty interest acquired by it by deed of conveyance from Frank M. Taylor.

Second: It is further agreed that Smitherman shall have and own an undivided one-eighth interest in all tanks erected on said land upon the payment to the Ohio of an equal one-eighth of the cost of all such tanks now on said land or to be erected thereon, payment to be made promptly upon receipt of bills from the Ohio.

Third: The Ohio agrees further that it will construct the necessary gathering lines at its own expense, convey the oil to storage tanks, and market the Smitherman one-eighth interest for a consideration of eight cents (8¢) per barrel payable on or before the 15th day of month following that during which the oil is run into the storage tanks.

Fourth: It is agreed further that Smitherman shall pay to the Ohio the one-eighth part of any charge that may be made by the Louisiana and Northwest Railroad on account of the construction and maintenance of a railroad siding on said tank farm and now being used for the transportation of tank material.

Fifth: Smitherman agrees to join with the Ohio in the execution of any division orders required to accomplish the sale of all or any part of the oil produced from the lands described in the assignments above referred to.

Sixth: It is further understood that the Ohio shall not be responsible for the loss of any such oil so placed in storage, by reason of evaporation or fire, or otherwise, except that if the Oil shall carry insurance on such oil Smitherman shall pay one-eighth of the cost of such insurance and be protected to the extent of his interest so insured.

In witness whereof the said James E. Smitherman has hereunto set his hand and the Ohio Oil Company has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereto affixed, the day and year first above written. This agreement shall be binding upon the heirs, successors and assigns of the parties hereto.

(Signed) JAMES E. SMITHERMAN.

Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Attest:
Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

105 State of Ohio,
County of Findlay.

Before me, the undersigned authority, personally came and appeared James E. Smitherman, of Shreveport, La., and the Ohio Oil Company appearing through J. C. Donnell, its President, and C. L. Fleming, its Secretary, who declared to me said Notary that they executed the above and foregoing agreement in writing for the purposes and considerations therein set forth and in the presence of the subscribing witnesses hereto.

In witness whereof, the said appearers have hereunto signed their names in the presence of me a Notary in the presence of two competent witnesses in my office in said County and State on the 12th day of July, 1921.

(Signed) JAMES E. SMITHERMAN,
THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Witnesses:
S. L. BEENE,
E. B. REDPATH.

W. R. HODGE, Notary Public.
My commission expires March 4, 1924."

"The Ohio Oil Co.

Shreveport, La., April 23, 1921.

Mr. J. E. Smitherman,
Shreveport, Louisiana.

Dear Sir:

With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North, Ranges 7 and 8 West, and in Twp.

23 North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender or cancel all or any part of any one or all of said leases then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors.

Yours very truly,
THE OHIO OIL COMPANY,
By J. K. KERR,
JKK:C. Vice-President.'

Granted.

106 10. On April 21, 1921, and within thirty days after the discovery, the partnership transferred to the Gilliland Oil Company forty acres on which the discovery well was located for a payment in the nature of a bonus or advanced royalty of approximately six hundred thousand ($600,000) Dollars, and at the same time entered into a "working agreement" with said company. The transfer and working agreement being as follows: (Exhibits L and M).

'State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me T. M. Milling, Notary Public in and for said Parish and State, duly commissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared that for the consideration hereinafter set forth, he has and does by these presents sell, assign, set over, trans-

fer and deliver, without warranty, but with full subrogation of all rights and actions in warranty, unto the Gilliland Oil Company, a Corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice-President, R. C. Gilliland, duly authorized hereto by Resolution of the Board of Directors, of said corporation, a certified copy of which is attached hereto, its successors and assigns.

An undivided one-half interest in and to that certain mineral lease executed by Mrs. Annie Taylor et al on March 3rd, 1919, in favor of J. E. Smitherman, filed for record on the 8th day of March, 1919, and recorded on the 30th day of April, 1919, in Book 10, folio 35, Conveyance records of Claiborne Parish, Louisiana, in so far as same covers and effects the Northwest quarter of the Northwest quarter (NW¼ of NW¼) of Section Fourteen (14), Township Twenty-three (23) North of Range Eight (8) West, containing forty acres more or less,

Together with a like interest in the oil well thereon known as Taylor Number Two (2), with all the machinery, appurtenances and attachments thereto belonging: Eight steel storage tanks having a total capacity of Seven thousand barrels together with the oil therein. and the oil in earthern storage heretofore produced by the well known as Taylor No. 2, whether situated on the above described property or not.

Also a like interest in and to the drilling well known as Taylor Number Four (4), subject however to the obligation of assignee to pay and discharge one-half of the cost and expenses of drilling said well, all situated in Claiborne Parish, Louisiana.

To have and to hold unto the said Purchasers, its successors and assigns, subject to the terms and conditions of said mineral leases.

The consideration for which this sale and assignment is made, is the sum and price of six hundred thousand ($600,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, and full
107 discharge and acquittance granted for same.

The same parties declared that it is understood between the parties to this agreement that all conditions between the parties hereto extend to their heirs, executors, administrators and assigns.

Thus done and passed at my office in said Parish of Caddo, in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this 21st day of April, A. D. Nineteen Hundred and Twenty-one.

JAMES E. SMITHERMAN,
GILLILAND OIL CO.,
By R. C. GILLILAND, Vice-Pres.

Attest:
SAM W. MASON,
E. G. PALMER.

T. M. MILLING,
Notary Public in and for
Caddo Parish, Louisiana.'

'Working Agreement.

State of Louisiana,
Parish of Caddo.

Know all men by these presents that this agreement is made and entered into by and between James E. Smitherman, married to Ina Thompson, a resident of

Shreveport, said Parish and State, hereinafter designated as party of the first part, and the Gilliland Oil Company, a corporation organized under the laws of the State of Delaware, authorized to do business in the City of Shreveport, Caddo Parish, Louisiana, herein appearing through R. C. Gilliland, duly authorized and empowered hereto, all as will appear by resolution of the Board of Directors of the said corporation, attached hereto and by reference made a party hereof, hereinafter called party of the second part,

Witnesseth:

That for and in consideration of the sum and price of Seven hundred and fifty thousand dollars ($750,000.00) to be paid in cash and property as hereinafter set forth, party of the first part binds and obligates himself to sell, assign and set over unto the party of the second part, and party of the second part agrees to buy, without warranty, but with full subrogation of all rights and actions of warranty, unto said party of the second part, its successors and assigns, and for the particular consideration set forth, the following described property, to-wit:

First: An undivided one-half interest in and to the mineral leases covering

Northwest quarter (NW¼) of Northwest quarter (NW¼) of Section Fourteen (14), Township 23 North Range 8 West, and the South half (S½) of Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section Eleven (11), Township 23 North, Range 8 West, Claiborne Parish, Louisiana,

together with the oil well thereon known as Taylor No. 2, and all drilling wells and equipment, tankage, derricks, etc., situated upon said lease, together with all the oil produced from said well known as Taylor No. 2, whether situated

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upon said property or not, for the consideration of the sum and price of Six hundred thousand dollars ($600,000.00).

Second: An undivided one-half interest in and to leases covering an amount of acreage checkerboarded throughout grantor's leases known as Haynesville acreage and situated in Township 23 North, Ranges Six (6), Seven (7), and Eight (8) West, Claiborne Parish, Louisiana, and in Township 20 South, Range 19 West, Columbia County, Arkansas, equal to approximately one-eighth (1/8) of the acreage owned by the said party of the first part in each and every section in which he owns leases in the said area, the total amount of acreage owned by him being approximately Twenty thousand (20,000) acres and the amount which he is transferring an undivided one-half (½) interest herein being Twenty-five hundred (2500) acres, more or less, for and in consideration of the sum and price of One hundred and fifty thousand dollars ($150,000.00), the said acreage being more particularly described and set out on a map thereof, reference to which is hereby made, and the said party of the first part agrees to accept as a part of the consideration to be paid by party of the second part for the property as above stated, at a valuation of Two hundred and fifty thousand dollars ($250,000.00), an undivided one-half interest in and to party of the second part's Tank Farm situated at Minden, Louisiana, together with all the tanks thereon, loading racks, machinery, pump stations, spur tracks, right of way, and equipment, piping, attachments and appurtenances thereto belonging, except eight (8) tanks, at present partially filled with oil, together with the ground upon which said eight tanks stand; the number of tanks herein transferred being guaranteed by party of the second part to be not less than fifteen (15) in number, with a total capacity of Seven hundred and fifty thousand (750,000) barrels;

And an undivided one-half interest in and to party of the second part's Six Inch Pipe Line known as "Number 2 line" and constructed from the said above described Tank Farm to its "Shaw-C" pump, station in Section 25, Township 21 North, Range 8 West, in the Homer oil field, together with a like interest in the right of way and telephone line thereon constructed and a like interest in and to the pump station situated on said lease and constituting a part of the said pipe line, with all the buildings and machinery thereunto belonging and an undivided one-half (½) interest in and to a six inch pipe line and right of way therefor, and telephone lines and pump stations therefor, to be built and constructed from said "Shaw C" leases in said Homer Field to the

Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section 14, Township 23 North, Range 8 West,

at the entire expense and cost of party of the second part.

In selling the above described leases and in acquiring said above described pipe line and appurtenances thereto, it is agreed and understood that the said property shall be operated as a partnership property but that party of the second part shall have the control and supervision thereof, it being agreed and undersood, however, that party of the second part shall confer with party of the first part, his agent or assigns, with reference to the general policy of drilling and marketing and otherwise disposing of the said oil.

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It is agreed and understood that if party of the second part does not desire to market the oil produced from the above described leases in due course,

that party of the first part shall have the right to sell his equal one-half (½) thereof from the loading rack of Tank Farm, as above stated, upon such terms and for such price as to him may seem fit, or to deliver a sufficient amount of said oil to pay party of the first part's portion of expense of exploiting said properties, to party of the second part on the basis and for the price that is paid by the Standard Oil Company Pipe Line at that time for a like grade and quality of oil currently produced and marketed from the Caddo Parish oil fields, it being agreed and understood that oil produced from Taylor No. 2 well is equal in grade and quality to Caddo 38 gravity; settlement for said oil to be made on or before the 15th day of the month succeeding that on which same is produced.

It is agreed and understood that party of the first part shall pay one-half (½) of all the expenses necessary and incident to exploiting, developing and producing oil and gas from said above described leases and for the marketing thereof as crude oil, at the loading rack or pipe line connection at the Tank Farm at Minden, Louisiana, together with the necessary expense and upkeep of operating the said pipe line, tank farm and other marketing facilities, together with a like proportion of all rentals, renewals and other expenses made necessary and incidental to keeping the said above described leases in full force and effect on or before the 15th day of the month succeeding that on which said expenses are incurred.

It is further agreed and understood that if party of the second part should desire to manufacture casing head gasoline, that all manufacturing plants made necessary for the purpose of manufacturing said casing head gasoline and all facilities for marketing same at Haynesville, Louisiana, shall be borne equally by the parties hereto and the profits derived therefrom shall likewise be shared equally by the parties hereto.

It is further agreed and understood that party of the second part shall have the right of ingress and egress in, on and over any and all leases now owned by the party of the first part in Claiborne Parish, Louisiana, for the purpose of building and constructing pipe lines, gathering pipe lines, pump stations, water lines and other facilities made necessary for the exploitation of the leases in and to which an undivided one-half (½) interest is herein transferred.

It is agreed and understood by and between the parties hereto that party of the first part shall bear no office or overhead expense made necessary by the above outlined operations for a period of two (2) years, but that the party of the first part shall lend such assistance and cooperation as is necessary and reasonable within his power in the way of securing right of way for a pipe line, assisting in clearing the titles of all defects and encumbrances and otherwise aiding in similar matters pertaining to said leases.

110 Party of the second part agrees to take over from the said James E. Smitherman his contract with Smitherman & McDonald, covering the drilling of the well known as Taylor No. 4, and agrees to carry out his contract with the said Smitherman & McDonald to the extent of two (2) additional wells on the basis of Twenty-five thousand dollars ($25,000.00) per well, turn-key jobs.

It is agreed and understood by and between the parties hereto that party of the second part shall pay over and deliver to the lessors or their assigns, of the premises hereinabove described, the stipulated royalty due to said lessors or their assigns, in accordance with the terms of the said leases on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

It is agreed and understood that party of the second part shall begin the construction for the extension of its pipe line from "Shaw-C" lease to the Haynesville field on April 19, 1921, and shall prosecute the building thereof with reasonable diligence to its completion, for the purpose of taking oil; and party of the second part guarantees it shall be completed not later than May 5th, 1921.

It is also agreed and understood by and between the parties hereto that the State, parish and local taxes for the year 1921 upon said pipe line, tank farm and appurtenances thereto, shall be paid in proportion of one-fourth (¼) by party of the first part and three-fourths (¾) by party of the second part.

It is also agreed and understood that as a part and parcel of this transfer that party of the first part will assign to party of the second part his rights to one-half of all water and water rights acquired by him from S. T. Hunt of Haynesville, Louisiana, on property situated in Sections 9 and 16, Township 23 North, Range 8 West, as per agreement of record in the Conveyance Records of Claiborne Parish, Louisiana.

In witness whereof the parties hereto have hereunto signed their names in duplicate in the presence of E. G. Palmer and Thos. M. Milling, two competent witnesses, on this 18th day of April, A. D. 1921.

(Signed) JAMES E. SMITHERMAN,
GILLILAND OIL COMPANY, INC.,
By R. C. GILLILAND.

Witnesses:
(Signed) E. G. PALMER,
T. M. MILLING.

Shreveport, La., June 27th, 1921.

The Foster Oil Company of Tulsa, Oklahoma, having purchased all of the property in Claiborne Parish and Webster Parish, Louisiana, lately owned by Gilliland Oil Company of Tulsa, Oklahoma, acquired from James E. Smitherman of Shreveport, La., and are now operating same with the six inch pipe line, pump stations, etc., from the Guy Taylor lease to Minden Tank Farm, Minden, La.

It is agreed and understood by and between the Foster Oil Company and James E. Smitherman that said property shall be owned and operated under the terms of the above and foregoing working agreement from and after June 22nd, 1921, at 8:00 o'clock A. M.

FOSTER OIL COMPANY,
By J. B. FOSTER, Pres.,
JAMES E. SMITHERMAN.

Witnesses:
E. G. PALMER,
JOHN W. BLUE.

111 State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me the undersigned Notary Public, duly commissioned and sworn, in and for said Parish and State personally came and appeared E. G. Palmer, to me well known, who being by me first duly sworn, did depose and say:

That he was one of the witnesses to the signature of James E. Smitherman and Gilliland Oil Company, by R. C. Gilliland, signed on April 18th, 1921;

That he saw the said parties sign the said contract in his presence and in the presence of T. M. Milling, the other subscribing witness thereto, on the date and for the purposes and consideration therein set forth.

Affiant further stated that he was one of the witnesses to the supplemental agreement hereinabove written, dated June 27, 1921, and signed by Foster Oil Company, by J. B. Foster, President, and James E. Smitherman.

That the said supplemental contract and agreement was signed in his presence and in the presence of John W. Blue, the other subscribing witness thereto, all for the purposes and consideration therein set forth.

(Signed) E. G. PALMER.

Sworn to and subscribed before me, Notary, on this 28th day of June, 1921.

(Signed) SAM W. MASON,
Notary Public."

Granted.

11. That the location of the discovery well and the leases transferred to the Ohio Oil Company and Gilliland Oil Company are shown on the map filed herein as Exhibit "G".

Granted.

12. That it was the intention of the partnership and of the Ohio Oil Company by said transfers to sub-lease the acreage covered.

Granted.

13. That the partnership received therefor from the transfers aforesaid the following:

From the Ohio Oil Company—

(a) Bonus $3,000,000.00

(b) Right to receive out of ½ first oil, reduced to present worth 900,000.00

(c) 1/8 excess or overriding royalty, reduced to present worth	1,300,000.00	
112	$5,200,000.00	
From the Gilliland Oil Co.—		
Bonus	$585,750.00	
7/16 interest retained reduced to present worth ..	585,750.00	
	$1,171,500.00	
Aggregate		$6,371,500.00

Granted.

14. The fair value of the property on which the discovery well was brought in, at date of discovery or within thirty days thereafter, was represented by the cash and its equivalent received by the partnership and the value of the interest retained by the partnership aggregating Six million, three hundred seventy-one thousand, five hundred ($6,371,500) Dollars, which was the fair market value of the property on the date of discovery and within thirty days thereafter; the fair market value of the property affected by the transfer to the Ohio Oil Company being $5,200,000.00 and of that affected by the Gilliland transfer being $1,171,500.00.

Granted.

15. The royalties expected to be received, without reducing to present worth, are as follows:

On transfer to Ohio Oil Co.	$1,625,000
On transfer to Gilliland Oil Co.	732,187

Granted.

16. That the cost of the well, being approximately $25,000, the fair market value of the property at date of discovery or within 30 days thereafter was disproportionate to cost.

Granted.

17. The total area, up to the date of discovery, being developed solely by the partnership, was not acquired as a result of the purchase of a proven tract or lease.

Granted.

18. That the partnership filed its returns of income for the calendar year 1921, in March, 1922, and its return of income for the calendar year 1922, in March, 1923, the said returns being filed herein as Exhibits "A" and "B".

Granted.

19. That on the return so filed by the said partnership for the years 1921 and 1922, in determining the net income to be accounted for by the partners, there was deducted from the gross income, among other items, the bonus moneys or advanced royalties paid by the said Ohio Oil Company and the Gilliland Oil Company during said years on account of the said above described transfers.

Granted.

20. That subsequent to the filing of the aforesaid partnership returns, the Commissioner of Internal Revenue upon an audit of same, disallowed as deductions the amounts of Four million, twenty-three thousand, nine hundred forty-eight and 35/100 ($4,023,-

948.56) Dollars and Five hundred seventy-six thousand, fifty-one and 44/100 ($576,051.44) Dollars, representing depletion sustained by bonuses, or advanced royalties for the years 1921 and 1922, respectively, thereby increasing the net income of the part-
113 nership to be accounted for by members.

That said disallowance was based on the theory that the conveyances made by the partnership to the Ohio Oil Company and Gilliland Oil Company, as aforesaid, constituted sales and not sub-leases. The audit letters being filed herein as exhibit "C".

Granted.

21. That matters relating to Geo. O. Baird Partnership were stipulated in an agreed statement of facts filed herein, which the Court is requested to adopt as its conclusions of fact respecting the same subject.

Granted.

22. That timely partnership returns for the years 1921 and 1922 were made by the Geo. O. Baird partnership to defendant; the returns being filed herein as exhibits "D" and "E", and that the audit letters from the Commissioner of Internal Revenue redetermining the net income of the Geo. O. Baird partnership for the same years are filed herein as Exhibit "F".

Granted.

23. Such action of the Commissioner of Internal Revenue with respect to the income of "J. E. Smitherman, Special Account," and the George O. Baird partnership, for the years 1921 and 1922, was reflected in the individual income tax returns of the petitioner with the result that the said Commissioner, on or

about December 21st, 1926, assessed against the petitioner the sum of One hundred twenty-nine thousand, one hundred thirty-eight and 75/100 ($129,138.75) Dollars, and Thirty-eight thousand, seventy-one and 17/100 ($38,071.17) Dollars, representing additional income taxes alleged to be due for the years 1921 and 1922. The 60 day letter from the commissioner being filed herein as Exhibit "V", with the admission by plaintiff that the adjustments made in plaintiff's income for the years 1921 and 1922, as set forth in said letter, were proper adjustments, with the exception of the adjustment made on account of income derived for the years 1921 and 1922 from the partnership "J. E. Smitherman, Special Account" and the Geo. O. Baird partnership, which are the subject matters of this controversy.

Granted.

24. That in the month of December, 1926, the said Jacob O. Bender, as such Collector of Internal Revenue aforesaid, made demand upon your petitioner for the payment of One hundred sixty-seven thousand, two hundred nine and 92/100 ($167,209.92) Dollars, with interest amounting to Forty-five thousand, seven hundred twenty-seven and 88/100 ($45,727.88) Dollars, representing additional 1921 and 1922 income taxes assessed against him by the Commissioner of Internal Revenue, by letter dated on or about December 21st, 1926, as follows:

1921	$129,138.75	
1922	38,071.17	
Totaling	$167,209.92	
and interest on 1921 tax of		$37,080.51
and 1922 tax of		8,647.37
Totaling		$45,727.88

the aggregate of taxes so assessed and interest being Two hundred twelve thousand, nine hundred thirty-seven and 80/100 ($212,937.80) Dollars.

114 Granted.

25. That plaintiff paid said sum under protest on January 4, 1927.

Granted.

26. That the petitioner duly filed with the defendant a claim for refund of the taxes and interest so paid, on May 4, 1928, and that said claim was complete in all respects and was in the form and manner as prescribed by the law and regulations governing the filing of claim for refund. That said claim was rejected by the Commissioner of Internal Revenue within six months thereafter and notice of rejection forwarded to petitioner.

That the petitioner later amended said claim by the filing of a supplemental claim for refund on June 19, 1928, and no decision thereon has been rendered by the Commissioner of Internal Revenue within six months from the date of filing thereof.

Granted.

27. That the statements stipulated herein with reference to the filing of income tax returns, the audit thereof, the assessment of additional taxes, the payment of taxes, and filing and rejection of claims for refunds, and like formal matters be adopted by the Court as its findings on the same subjects.

Granted.

28. That the tables showing the net incomes of "J. E. Smitherman, Special Account" and Geo. O.

Baird partnership, for the years 1921 and 1922, the distributible share thereof of each partner, the net incomes and personal exemptions of each plaintiff herein and the plaintiffs in the other related suits, as finally determined by the Commissioner of Internal Revenue filed herein by stipulation, be adopted by the Court as its findings on the same subject.

Granted.

29. That the Court adopt as its findings of facts all facts stipulated in the trial hereof.

Granted."

Thereafter, and on the same day the Court denied in part plaintiff's said motion for judgment, in these words, to-wit: "Denied in part. See written opinion."

To which ruling of the Court on said motion for judgment, insofar as the same denied plaintiff judgment as prayed for, plaintiff then and there excepted and reserved this bill of exceptions.

The foregoing Bill of Exceptions is hereby settled and allowed. June 18, 1931.

BEN C. DAWKINS, Judge.

Filed June 18, 1931.

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115 BILL OF EXCEPTIONS No. 2.

(Title Omitted.)

Be it remembered, that after this case was closed, counsel for plaintiff, on July 16, 1930, filed for and on behalf of plaintiff, a request for finding of facts

and conclusions of law, which the Court took under advisement, and on June 10, 1931, granted all requests for finding of facts, which requests for findings of fact and rulings thereon are made a part hereof by reference, but denied requests for conclusions of law Nos. 1, 2, 3, 4(a), 4(d), 4(e), 4(f) and 4(g), which requests for conclusions of law and rulings denying the same are as follows:

"1. That the transfer from J. E. Smitherman to the Ohio Oil Company (Exhibit "N") was a sub-lease, and not a sale or assignment as determined by the Commissioner of Internal Revenue.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"2. That Plaintiff, as a member of the "J. E. Smitherman, Special Account" partnership, in arriving at net income is entitled to deduct depletion against the bonus or advanced royalty received, on account of the transaction with the Ohio Oil Company, which depletion should be based on discovery valuation.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"3. That such depletion should be computed and allowed under Treasury Decision No. 3938.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"4. With respect to the Geo. O. Baird partnership, the conclusions of law requested to be determined are:

(a) That the agreement with the Gulf Refining Co. of Louisiana of November 16, 1921, was a contract of loan with respect to the $350,000.00 received thereunder, which was not taxable income to plaintiff for the year 1921.

116 Denied.

(d) That the contract did not immediately convey title, but at most only granted a right to demand a conveyance in the future.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(e) That even if the contract could properly have been construed a contract of sale of the lease, the vendor reserved the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(f) That plaintiff is entitled to depletion based upon discovery revaluation in either event, viz: whether the contract is considered as not immediately conveying title, but at most as only granting a right to demand a conveyance in the future, or, whether construed as a contract of sale of the lease, the vendor reserving the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(g) That in the event the Court should hold the contract to have been other than a contract of loan and to have been an executed as distinguished

from an executory agreement, under which title immediately passed, then the contract under the law of Louisiana imported a sub-lease, as distinguished from a sale or assignment, in which case the right to depletion based upon discovery revaluation remained unaffected.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

To which action of the Court in denying said requested conclusions of law and in not granting the same, counsel for plaintiff then and there excepted and reserved this Bill of Exceptions.

The foregoing Bill of Exceptions is hereby settled and allowed. June 18, 1931.

BEN C. DAWKINS, Judge.

Filed June 18, 1931.

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117 BILL OF EXCEPTIONS No. 3.

(Title Omitted.)

Be it remembered, that after this case was closed, counsel for defendant on July 3, 1930, filed for and on behalf of defendant, a request for findings of fact and conclusions of law, which the Court took under advisement, and on June 10, 1931, granted the request of defendant for conclusions of law Nos. 1, 2, and the first sentence of request for conclusion of law No. 5, which requested conclusions of law and the ruling thereon are as follows:

"1. The instruments in question relating to the transactions of the Smitherman Partnership were assignments or acts of sale, and not subleases.

Granted on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"2. The instruments in question relating to the transactions of the Baird partnership were assignments or acts of sale and not subleases, pledges or mortgages.

Granted on authority of 40 Fed (2) 892; 42 Fed. (2) 943.

"5. No further deductions from gross income are allowable in either 1921 or 1922 on account of depletion. If the instruments in question were not acts of sale, it is apparent that the transferors had parted with all their interest in the depletable property and are, therefore, not entitled to depletion.

First sentence granted; second sentence denied."

To which rulings of the Court in granting defendant's request for conclusions of law Nos. 1, 2 and the first sentence of No. 5, counsel for plaintiff then and there excepted and reserved this bill of exceptions.

The foregoing Bill of Exceptions is hereby settled and allowed. June 18, 1931.

BEN C. DAWKINS, Judge.

Filed June 18, 1931.

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118 BILL OF EXCEPTIONS No. 4.

(Title Omitted.)

Be it remembered that after this case was closed, counsel for plaintiff filed on June 10, 1931, for and on behalf of plaintiff and after the Court had granted

all plaintiff's requests for findings of fact, which requests for findings of fact and ruling thereon are made part hereof by reference, a request that, considering the facts set forth in plaintiff's requests for findings of fact to be proved, the Court determine additional conclusions of law, whereupon the Court denied requests for additional conclusions of law, 5, 6, 7, 8 and 10, which requested conclusions of law and rulings thereon are as follows:

"5. That under the law of Louisiana, as expressed in the decisions of the Supreme Court of Louisiana, in the cases of Smith vs. Sun Oil, 165 La. 907 and Johnson vs. Moody, 168 La. 799, the transfer from Smitherman to Ohio Oil Company, dated April 2[illegible] 1921 (Ex. N. R. 116) was a sub-lease and not an assignment or sale.

Denied on the authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

"6. That under the law of Louisiana, as declared by the Supreme Court of Louisiana in the cases of Spence vs. Lucas, 138 La. 763, Logan vs. State Gravel Co., 158 La. 105, and Board of Commissioners vs. Pure Oil Co., 167 La. 801, royalty under a contract respecting minerals is regarded as rent and governed by the law of lease, and therefore the transfer from Smitherman to Ohio Oil Company, aforesaid, was a sub-lease and not an assignment or sale.

Denied on the authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

"7. That under the law of Louisiana as contained in the Revised Civil Code in Articles 2046, 2711, 2712 and 2729, thereof, and in the decisions of the Supreme Court of Louisiana in the cases of Knapp vs. Guerin,

144 La. 754, Battalin of Washington Artillery vs. Sillway, 161 La. 925, and Smith vs. Sun Oil Co., 165 La. 907, no right of reversion, as that term is
119 understood at common law, or express right of re-entry, is necessary in Louisiana to constitute the transfer of a lease as a sub-lease.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

"8. That tested by the Civil Law of Louisiana, as set forth in the Revised Civil Code and in the jurisprudence of Louisiana and particularly the decision of the Supreme Court of Louisiana in the case of Smith vs. Sun Oil Company, 165 La. 907, the transfer from Smitherman to Ohio Oil Co., aforesaid, was a sublease and not a sale or assignment.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943.

"10. That the transfer from Smitherman to Ohio Oil Co. being a Louisiana contract, and governed by the law of Louisiana, and having been made by the parties in reliance upon the law of Louisiana, the decision of the United States Circuit Court of Appeals in the case of Waller vs. Commissioner reported in 40 Fed. Rep. (2nd) 892, construing said transfer to be an assignment and not a sub-lease is equivalent to taking petitioner's property without due process of law and is contrary to the provisions of Article 1 of the Fourteenth Amendment of the Constitution of the United States.

Denied on authority of 40 Fed. (2) 892, and 42 Fed. (2) 943."

To which action of the Court in denying said requests for conclusions of law, and in not granting the same, plaintiff then and there excepted and reserved this bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed. June 18, 1931.

BEN C. DAWKINS, Judge.

Filed June 18, 1931.

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120 BILL OF EXCEPTION No. 5.

(Title Omitted.)

Be it remembered that on May 26th, 1930, defendant filed a motion for judgment at the conclusion of the trial hereof, which the Court took under advisement and on June 10, 1931, after finding all facts, as requested by plaintiff, denied, in part only, defendant's said motion for judgment in these words, to-wit: "Denied in part. See written opinion."

To which ruling on said motion for judgment filed by defendant, insofar as the same was granted, and insofar as the same denied plaintiff judgment, as prayed for, plaintiff then and there excepted and reserved this bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed.

June 18, 1931.

BEN C. DAWKINS,
Judge.

Filed June 18, 1931.

121 PETITION FOR APPEAL.

Filed June 26, 1931.

(Title Omitted.)

Your petitioner, E. G. Palmer, respectfully shows:

1.

That petitioner is the plaintiff in the above entitled cause; that a final judgment was rendered in the above cause on the 19th day of June, 1931, by which judgment plaintiff is aggrieved and desires to appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit of New Orleans, Louisiana, and attaches hereto Assignment of Errors, upon which he relies for his appeal and application for relief herein.

Wherefore, he prays for citation hereof to defendant, as is required by law, that an order issue allowing said appeal, fixing the amount of bond therefor, and for such other orders as may be necessary in the premises.

FRED R. ANGEVINE,
Fred R. Angevine,

JOHN TUCKER,
SMITHERMAN, TUCKER & MASON,
Smitherman, Tucker & Mason,

DART & DART,
Dart & Dart,
Attorneys for Plaintiff.

122 ASSIGNMENT OF ERRORS.

Filed June 26, 1931.

(Title Omitted.)

Now into Court comes E. G. Palmer and makes and files in connection with his appeal herein, this, his assignment of errors, upon which he will rely in the prosecution of the appeal herein from the judgment of this Court entered on the 19th day of June, 1931, which errors committed by the Court to his prejudice are as follows:

1.

The District Court erred in not granting plaintiff judgment for the full amount prayed for.

2.

The Court erred in finding and holding that the instrument executed by the J. E. Smitherman partnership to the Ohio Oil Company, on April 29, 1921, referred to as Exhibit "N," constituted a sale or assignment.

3.

The Court erred in not finding and holding that the said instrument executed by the J. E. Smitherman partnership and the Ohio Oil Company on April 23, 1921, constituted a sub-lease from the partnership to said company.

4.

The Court erred in not finding and holding that the instrument executed by J. E. Smitherman and the

Ohio Oil Company, on April 23, 1921, referred to as "Exhibit N," and appearing in full in plaintiff's request for finding of fact, No. 9, which request was granted by the Court, constituted a sub-lease.

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5.

The Court erred in not finding and holding that the partnership, and consequently, the petitioner in proportion to his participation therein, was entitled to deductions for depletion, on the fair market value of the discovery property, found by the Court to be Six million, three hundred seventy-one thousand, five hundred ($6,371,500.00) Dollars, at the date of discovery or within thirty days thereafter, against the bonuses or advance royalties received by the partnership from the Ohio Oil Company under the instrument above referred to.

6.

The Court erred in not finding and holding that the J. E. Smitherman partnership, in filing its information return for the members thereof, was entitled to deduct against the bonuses or advance royalties received from the Ohio Oil Company, the amount of Three million, one hundred forty-one thousand, nine hundred seventy-six and 32/100 ($3,141,976.32) Dollars, for the year 1921, and Five hundred twenty-eight thousand, six hundred three and 68/100 ($528,603.68) Dollars for the year 1922, respectively, for depletion.

7.

The Court erred in not finding and holding that the petitioner was entitled to report as income from the J. E. Smitherman partnership, his respective share of

said partnership, income computed after the deduction for depletion against the bonuses or advance royalties received by the J. E. Smitherman partnership from the Ohio Oil Company.

8.

With respect to the George O. Baird partnership matter involved herein, the District Court erred to the prejudice of plaintiff in the following respects:

(a) In holding that the contract of November 16, 1921, from George O. Baird and associates to the Gulf Refining Company of Louisiana was a sale.

(b) In not holding that the said contract did not immediately convey title, but at most only granted a right to demand a conveyance in the future.

(c) In not holding that even if the contract could properly have been construed as a sale of the lease, vendor reserved the right to 60% of the oil produced from the property in question.

(d) In not holding plaintiff to be entitled to depletion based upon discovery revaluation in either event, viz: whether the contract is considered as not
124 immediately conveying title, but at most as only granting a right to demand a conveyance in the future, or, whether construed as a contract of sale of the lease, the vendor reserving the right to 60% of the oil produced from the property in question.

(e) In not holding that the contract, even if considered not to have been a contract of loan, and not to have been an executed as distinguished from an executory agreement, under which title immediately passed,

under the law of Louisiana, imported a sub-lease as distinguished from a sale or assignment, in which case the right to depletion based upon discovery revaluation remained unaffected.

9.

That the Court having found all the facts to be as requested by plaintiff, erred in denying and in not granting his requests for conclusions of law, Nos. 1, 2, 3, 4 (a), (d), (e), (f) and (g), 5, 6, 7, 8 and 10, which requests and rulings thereon denying the same are as follows:

"1. That the transfer from J. E. Smitherman to the Ohio Oil Company (Exhibit "N") was a sub-lease, and not a sale or assignment as determined by the Commissioner of Internal Revenue.

"Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"2. That plaintiff, as a member of the "J. E. Smitherman, Special Account" partnership, in arriving at net income is entitled to deduct depletion against the bonus or advanced royalty received, on account of the transaction with the Ohio Oil Company, which depletion should be based on discovery revaluation.

"Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"3. That such depletion should be computed and allowed under Treasury decision No. 3938.

"Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

"4. With respect to the George O. Baird partnership, the conclusions of law requested to be determined are:

(a) That the agreement with the Gulf Refining Company of Louisiana, of November 16, 1921, was a contract of loan with respect to the $350,000.00 received thereunder, which was not taxable income to plaintiff for the year 1921.

Denied.

(d) That the contract did not immediately convey title, but at most only granted a right to demand a conveyance in the future.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(e) That even if the contract could properly have been construed a contract of sale of the lease, the vendor reserved the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(f) That plaintiff is entitled to depletion based upon discovery revaluation in either event,
125 viz: whether the contract is considered as not immediately conveying title, but at most as only granting a right to demand a conveyance in the future, or, whether construed as a contract of sale of the lease, the vendor reserving the right to 60% of the oil produced from the property in question.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

(g) That in the event the Court should hold the contract to have been other than a contract of loan and to have been an executed as distinguished from an executory agreement, under which title immediately passed, then the contract under the law of Louisiana imported a sub-lease, as distinguished from a sale or assignment, in which case the right to depletion based upon discovery revaluation remain unaffected.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

5. That under the law of Louisiana, as expressed in the decisions of the Supreme Court of Louisiana, in the cases of Smith vs. Sun Oil, 165 La. 907, and Johnson vs. Moody, 168 La. 799, the transfer from Smitherman to Ohio Oil Co., dated April 23, 1921 (Exhibit N. R. 116), was a sub-lease and not an assignment or sale.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

6. That under the law of Louisiana as declared by the Supreme Court of Louisiana in the cases of Spence vs. Lucas, 138 La. 763, Logan vs. State Gravel Co., 158 La. 105, and Board of Commissioners vs. Pure Oil Co., 167 La. 801, royalty under a contract respecting minerals is regarded as rent and governed by the law of lease, and therefore the transfer from Smitherman to Ohio Oil Co., aforesaid, was a sub-lease and not an assignment or sale.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

7. That under the law of Louisiana as contained in the Revised Civil Code in Articles 2046, 2711, 2712

and 2729, thereof, and in the decisions of the Supreme Court of Louisiana in the cases of Knapp vs. Guerin, 144 La. 754; Battalin of Washington Artillery vs. Sillway, 161 La. 925, and Smith vs. Sun Oil Co., 165 La. 907, no right of revrsion, as that term is understood at common law, or express right of re-entry, is necessary in Louisiana to constitute the transfer of a lease as a sub-lease.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

8. That tested by the Civil Law of Louisiana, as set forth in the Revised Civil Code and in the jurisprudence of Louisiana and particularly the decision of the Supreme Court of Louisiana in the case of Smith vs. Sun Oil Co., 165 La. 907, the transfer from Smitherman to Ohio Oil Co., aforesaid, was a sublease and not a sale or assignment.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

10. That the transfer from Smitherman to Ohio Oil Co. being a Louisiana contract, and governed by the laws of Louisiana, and having been made by the parties in reliance upon the law of Louisiana, the decision of the United States Circuit Court of Appeals in the case of Waller vs. Commissioner, reported in 40 Fed. Red. (2nd) 892, construing said transfer to be an assignment and not a sublease is equivalent to taking petitioner's property without due process of law

of law and is contrary to the provisions of
126 Art. 1, of the Fourteenth Amendment of the Constitution of the United States.

Denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

10.

The Court erred in granting and in not denying requests for conclusions of law filed by the defendant, Nos. 1, 2 and the first sentence of requests No. 5, which requests and rulings thereon granting the same are as follows:

1. The instruments in question relating to the transactions of the Smitherman partnership were assignments or acts of sale, and not sub-leases.

Granted on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

2. The instruments in question relating to the transactions of the Baird Partnership were assignments or acts of sale and not sub-leases, pledges or mortgages.

Granted on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

5. No further deductions from gross income are allowable in either 1921 or 1922 on account of depletion. If the instruments in question were not acts of sale, it is apparent that the transferors had parted with all their interest in the depletable property and are, therefore, not entitled to depletion.

First sentence granted; second sentence denied."

11.

That the Court erred in not granting plaintiff's motion for judgment at the conclusion of the evidence, after having found all the facts to be as requested by plaintiff.

12.

The Court erred in denying in part plaintiff's motion for judgment on the conclusion of the evidence, after having found all the facts to be as requested by plaintiff.

13.

That the Court erred in denying in part only, and in not denying in toto defendant's motion for judgment at the conclusion of all the evidence, the Court having found all the facts to be as requested by plaintiff.

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14.

That the Court erred in giving judgment in favor of plaintiff only for a portion of his demand, and in not giving him judgment in full as prayed for in his petition.

Wherefore, he assigns the foregoing errors as the basis of this, his appeal herein, and thereon prays that the opinion and decree herein be set aside and that he have judgment in his behalf as prayed for.

FRED R. ANGEVINE,
Fred R. Angevine,
SMITHERMAN, TUCKER & MASON,
Smitherman, Tucker & Mason,
DART & DART;
Dart & Dart,
Attorneys for Plaintiff.

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ORDER.

Considering the foregoing application made and filed, it is ordered that said appeal be allowed, returnable to

the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, on plaintiff giving bond and security, according to law, in the sum of Five hundred ($500.00) Dollars; that notice of said appeal be given to defendant, Jacob O. Bender, individually and as Collector of Internal Revenue for the District of Louisiana, and that the Clerk of this Court make and transmit to the United States Circuit Court of Appeals for the Fifth Circuit, a transcript of the record in this case under his certificate.

Done and signed, at Shreveport, Louisiana, on this 27th day of June, 1931.

BEN C. DAWKINS,
Judge.

Filed June 27, 1931.

129 BOND.

(Title Omitted.)

Know all men by these presents: That we, E. G. Palmer, as principal, and W. C. Woolf and M. Vander Sluys, as sureties, are held and firmly bound unto Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said Jacob O. Bender, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly, severally and in solido by these presents.

Sealed with our seals and dated this 26th day of June, 1931.

And whereas, lately at the February term of the United States District Court for the Western District of Louisiana, in a suit pending in said Court between E. G. Palmer, plaintiff, and Jacob O. Bender, individually and as Collector of Internal Revenue for the District of Louisiana, defendant, a judgment was rendered against said E. G. Palmer at the said term of Court, and the said E. G. Palmer has petitioned for and been allowed by said Court an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and citation has been issued, directed to the said Jacob O. Bender, citing him to appear in the said United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, thirty days from and after the date of such citation;

Now, the condition of the above obligation is such that if the said E. G. Palmer shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the above obligation will be void, otherwise to remain in full force and virtue.

W. C. WOOLF,
M. VANDER SLUYS,
E. G. PALMER.

130 State of Louisiana,
Parish of Caddo.

On this day before me, John H. Tucker, Jr., Notary Public, within and for the Parish and State aforesaid, personally came and appeared W. C. Woolf and M. Vander Cluys, to me known to be the parties who has signed the above and foregoing bond, as sureties thereon, who being by me first duly sworn, each deposes and says: "That he is worth, over and above all debts and obligations, in assets that can be subjected to levy

under execution, the amount for which he has bound himself in said bond."

W. C. WOOLF,
M. VANDER SLUYS,

Sworn to and subscribed before me on this the 27 day of June, 1931.

JOHN H. TUCKER, JR.,
Notary Public.

State of Louisiana,
Parish of Caddo.

On this day before me, John H. Tucker, Jr., Notary Public, came and appeared E. G. Palmer, to me known to be the party who has signed the above and foregoing bond, as principal thereon, who being by me first duly sworn, deposes and says: "That he is informed and believes that the facts set out in above affidavit of sureties on said bond are true and correct."

E. G. PALMER.

Sworn to and subscribed before me on this the 27th day of June, 1931.

JOHN H. TUCKER, JR.,
Notary Public.

The within Bond is hereby approved, this 27 day of June, 1931.

BEN C. DAWKINS,
Judge.

Filed June 27, 1931.

131 CITATION OF APPEAL.

United States District Court for the Western District of Louisiana, Shreveport Division.

The President of the United States of America:

To Jacob O. Bender, individually and as Collector of Internal for the District of Louisiana, New Orleans, Louisiana—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of New Orleans, Louisiana, on the thirtieth day from the date hereof, pursuant to a petition and order of appeal and assignment of errors, filed in the Office of the District Court of the United States for the Fifth Circuit and the Western District of Louisiana, wherein E. G. Palmer is plaintiff and appellant, and you are defendant and appellee to show cause, if any there be, why the judgment rendered against the said E. G. Palmer as in said petition and order of appeal and assignment of errors mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand in the City of Shreveport, in the Western District of Louisiana, Shreveport Division, this 26th day of June, 1931.

BEN C. DAWKINS,
Judge of the United States District Court for the Western District of Louisiana, Shreveport Division.

Service of copy of the foregoing Citation is acknowledged this 27th day of June, 1921.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana, Attorney for Defendant.

Filed June 30, 1931.

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132 (Title Omitted.)

1. It is hereby stipulated that there shall be filed in evidence herein the following:

Exhibit A. The partnership return for the year 1921 of the partnership, J. E. Smitherman, Special Account.

Exhibit B. The partnership return for the year 1922 of the partnership, J. E. Smitherman, Special Account.

Exhibit C. Audit letters from the Commissioner of Internal Revenue redetermining the net income of the partnership, J. E. Smitherman, Special Account, for the years 1921 and 1922.

Exhibit D. Partnership return of George O. Baird Partnership for the year 1921.

Exhibit E. Partnership return for George O. Baird Partnership for the year 1922.

Exhibit F. Audit letters from the Commissioner of Internal Revenue redetermining the net income of the George O. Baird partnership for the years 1921 and 1922.

Exhibit G. The narrative statement of the evidence adduced before the Board of Tax Appeals in the case entitled L. T. Waller et al. vs. Commissioner of Internal Revenue, No. 20,196, on the docket of the United States Board of Tax Appeals, and appearing with direct examination of Mr. Smitherman at pages 47 to page 86 of the transcript of the record on appeal for review to the United States Circuit Court of Appeals for the Fifth Circuit, No. 5823 on the docket of said Court.

The exhibits filed in said case of Waller vs. Commissioner, appearing at pages 86 to 124 of said transcript of record, specifically described as follows (Exhibits H to P, Incl.):

Exhibit H. Oil and gas lease from Mrs. Anna Taylor et al to J. E. Smitherman (Page 86).

Exhibit I. Oil and Gas Lease from Mrs. Anna Taylor et al to J. E. Smitherman (Page 92).

Exhibit J. Oil and Gas Lease from H. P. Camp to J. E. Smitherman (Page 97).

133 Exhibit K. Oil and Gas Lease geom G. W. Taylor to J. E. Smitherman, (Page 102).

Exhibit L. Transfer from James E. Smitherman to Gilliland Oil Co. (Page 106).

Exhibit M. Working agreement, James E. Smitherman and Gilliland Oil Co. (Page 109).

Exhibit N. Transfer, James E. Smitherman to Ohio Oil Co. (Page 116).

Exhibit O. Working Agreement, James E. Smitherman and Ohio Oil Co. (Page 119).

Exhibit P. Letter from Ohio Oil Co. to James E. Smitherman. (Page 123).

Exhibit Q. Transfer, James E. Smitherman to Ohio Oil Co.

Exhibit R. Transfer, James E. Smitherman to Gilliland Oil Co.

Exhibit S. A map of part of Township 23, North, Range 8 West, Claiborne Parish, Louisiana, being identical with Exhibit No. 6 referred to in the narrative statement of evidence above referred to except that the colors shown on said map have been changed as follows:

The yellow color represents acreage in the main producing field, known as the Haynesville Oil Field, transferred to J. E. Smitherman to the Ohio Oil Co.;

The red color represents the acreage transferred to the Gilliland Oil Co.; and

The pink color represents the acreage transferred by J. E. Smitherman to the Louisiana Oil & Refining Company prior to the bringing in of the discovery well

Exhibit T. The individual income tax return for E. G. Palmer for the year 1921.

Exhibit U. The individual income tax return for E. G. Palmer for the year 1922.

Exhibit V. The sixty day letter from the Commissioner of Internal Revenue to E. G. Palmer, containing notice of the proposed assessment resulting from the audit of his income tax returns for the years 1921 and 1922, plaintiff admitting that the adjustments made in

the income for the years 1921 and 1922 of E. G. Palmer as set forth in said letter, were proper adjustments with the exception of the adjustments made on account of income derived for the years 1921 and 1922 from the partnership J. E. Smitherman, Special Account, and the George O. Baird partnership, which are the subject matter of this controversy.

Exhibit W. Transfer from George O. Baird to J. Rogers Flannery, copy of which is attached to the record of suit of Baird v. Flannery, filed herein as Exhibit X.

Exhibit X. Record in the suit of George O. Baird vs. J. Rogers Flannery, No. 5211, Third Judicial Court of Louisiana in and for Claiborne Parish.

Exhibit Y. Agreement between George O. Baird and Gulf Refining Co. of Louisiana.

134 2. It is hereby stipulated that all of the above evidence, insofar as pertinent to the individual cases consolidated herewith for the purpose of trial, shall be considered applicable to those cases; it being understood that the evidence with respect to the J. E. Smitherman, Special Account, applies to all of the suits consolidated for trial, whereas that with respect to the George O. Baird partnership is applicable only to the cases of Mrs. J. K. Findley vs. Jacob O. Bender No. 1906 and Mrs. E. G. Palmer vs. Jacob O. Bender No. 1905, and E. G. Palmer vs. Jacob O. Bender, No. 1904.

JOHN H. TUCKER, JR.,
FRED R. ANGEVINE,
Attorneys for Plaintiff.
PHILIP M. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

135 EXHIBIT "C."

United States of America,
Treasury Department,
Washington.

February 10, 1930.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of letter dated January 11, 1926, to Mr. J. E. Smitherman, Special Account, Shreveport, Louisiana, from C. R. Nash, Assistant to the Commissioner, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:
(Signed) F. A. BIRGFELD,
F. A. Birgfeld,
(Seal) Chief Clerk, Treasury Department.

JP—WMB—EOH—FFT—CMC.

Filed May 26, 1930.

136 IT:Pa:4
JRC:405.

Jan. 11, 1926.

Mr. J. E. Smitherman, Special Account,
928 Commercial National Bank Building,
Shreveport, Louisiana.

Sir:

An audit of your income tax returns for the years 1920, 1921 and 1922 in connection with the verification of your records and books of account disclose additional income in the amount as $4,649.62, $4,230,-658.52 and $2,027,135.74 for these years respectively, to be distributed among the partners.

The adjustments recommended in the Revenue Agent's report dated March 12, 1924, have been accepted with the following exceptions:

1921.

Income from oil sales has been decreased from $536,638.34 to $385,587.14, the amount shown on Form O.

Depletion of $272,379.54 has been computed on the income derived from working and royalty interests held in your name.

Depreciation has been computed on $66,824.31; the value of the physical property on all leases, at the rate of .04398 instead of .05 as shown in the report. This adjustment decreases the total deduction for depreciation from $12,987.31 to $12,585.02.

The correct net income for this year is found to be $4,623,081.13.

1922.

The income from oil sales has been increased from $2.775,173.05 to $3,659,309.25, the amount reported on Form O.

3,659,309.25
2,775,173.05

884,136.20

137 In Re: Mr. J. E. Smitherman.

Depletion of $2,464.140.39, computed on income from working and royalty interests has been allowed.

Depreciation has been computed on $351,596.21, the value of physical property on all leases, at the rate of .11671 instead of .10 on $147.535.73 and .05 on the balance as shown in the report.

These adjustments disclose a net income of $2,266,-730.28 for this year.

No payment of the further tax should be made on behalf of the partners until they have been advised of the results of the audit of their returns and have received notice and demand for payment from the Collector of Internal Revenue for their respective districts.

Respectfully,
C. R. NASH,
Assistant to the Commissioner,
By .....
Head of Division.

REB.
C/ht-2.
HEB, 10/28/25.
BJB, 11/9/25.

138 United States of America,
Treasury Department,
Washington.
February 10, 1930.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of letter dated April 1, 1923, (with statement attached), to J. E. Smitherman Special Account (A partnership), Shreveport, Louisiana, from E. W. Chatterton, Deputy Commissioner, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:
(Signed) F. A. BIRGFELD,
F. A. Birgfeld,
(Seal) Chief Clerk, Treasury Department.

JP—WMB—EOH—FFT—CMC.

139 IT:NR:F—7-FAR-4196.

April 1, 1923.

J. E. Smitherman, Special Account (A partnership),
Commercial National Bank Building,
Shreveport, Louisiana.

Sirs:

An examination of your income tax returns for the year 1921 together with the information heretofore submitted has been made and the results thereof are outlined in the attached statement.

In accordance with the provisions of Section 250(d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:NR:F-7-FAR-4196, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the

final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
E. W. CHATTERTON,
Deputy Commissioner.

By A. H. FAY,
Head of Division.

Enclosure: Statement.

FAR 4/2/23.
HTS 4/10/23.
EOH 4/14/23.

140 IT: NR: F-7.
FAR:4196.

Statement.

In re: J. E. Smitherman, Special Account (a partnership), Commercial National Bank Building, Shreveport, Louisiana.

1921.

Net income reported		$392,422.61
Plus:		
Profit on sale of oil property to Gilliland Company		600,000.00
Profit on sale of oil property to Ohio Oil Company		4,000,000.00
Depletion claimed	$536,638.34	
Depletion allowed	422,643.56	

Depletion disallowed	113,994.78
Net income corrected	$5,106,417.39

Distribution of net income to partners:

John C. Sherman, Haynesville, La.	$242,554.83
A. A. Southern, Haynesville, La.	181,890.59
J. R. Bevil, Haynesville, La.	60,664.24
R. G. Smitherman, Haynesville, La.	121,277.41
G. G. Harris, Haynesville, La.	121,277.41
J. C. McEachern, Haynesville, La.	121,277.41
Claude Benne and C. E. Miller, Haynesville, La.	181,890.59
H. A. Longino and D. D. Goode, Haynesville, La.	121,277.41
Waller Brothers and Co., Haynesville, La.	242,554.83
Baucum Brothers, Haynesville, La.	181,890.59
S. L. Benne, Haynesville, La.	121,277.41
L. L. Benne, Haynesville, La.	121,277.41
S. J. Benne, Haynesville, La.	121,277.41
L. A. Benne, Haynesville, La.	60,664.24
L. T. Waller, Haynesville, La.	121,277.41
Mrs. W. L. Benne, Haynesville, La.	60,664.24
M. M. Morelock, Haynesville, La.	121,277.41
B. W. Marden, Shreveport, La.	60,664.24
C. D. Keene, Shreveport, La.	60,664.24
J. E. Smitherman, Shreveport, La.	808,499.06
E. G. Palmer, Shreveport, La.	808,499.06
Mrs. R. T. Layne, Shreveport, La.	808,499.06
J. Y. Snyder, Shreveport, La.	255,302.87

The additional income as indicated above will be added to the income reported by each individual. The provisions of Section 211 of the Revenue Act of 1921 will be applied in computing the surtax.

Filed May 26, 1930.

141 EXHIBIT "F."

United States of America,
Treasury Department,
Washington.

February 11, 1930.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of letter dated December 21, 1926, to George O. Baird, Partnership, Shreveport, Louisiana, from C. R. Nash, Assistant to the Commissioner, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:
(Signed) F. A. BIRGFELD,
F. A. Birgfeld,
(Seal) Chief Clerk, Treasury Department.

MK—WMB—AMR—EOH—CMC—FFT.

142 IT:PA:PYA.
ARM:

Dec. 21, 1926.

George O. Baird, Partnership,
Ardis Building,
Shreveport, Louisiana.

Sirs:

A reaudit of your 1921 and 1922 partnership income tax returns, in connection with the information contained in the reports of the Internal Revenue Agent in Charge at New Orleans, Louisiana, dated January 22, 1924, and November 3, 1926, discloses distributive interests as follows:

1921.

To the individuals comprising the firm of George O. Baird, Partnership	$182,579.19	175,912.32
To Mrs. Thigpen and Mrs. Herold	$ 91,955.25	88,621.81
To Messrs. Thigpen, Herold, Palmer and Baird	$125,709.66	122,376.25

1922.

To the individuals composing the firm of George O. Baird, Partnership	$73,156.64
To Mrs. Thigpen and Mrs. Herold	$37,363.67
To Messrs. Thigpen, Herold, Palmer and Baird	$36,349.98

The manner of determining the above-stated amounts follows:

1921.

Oil sales as shown in revenue agent's report (Schedule 4-A)		$452,480.42
Plus: Income eliminated from 1920 which has been determined to be 1921 income		97,085.56
Gross income from oil sales		$549,565.98
Deductions as shown in revenue agent's report:		
Salary	$6,600.00	
Officers' salary	4,119.95	
Commissions paid	34,298.00	
Fire and liability ins.	3,179.32	
Auto and team expense	3,023.09	
Office expense and supplies	1,689.12	
General expense	3,023.38	
Labor	30,848.97	

	Freight	302.82	
	Supplies used	1,614.78	
	Power house expense	1,978.99	
	Well expense	2,676.89	
	Camp expense	4,276.88	
	Taxes	16,056.71	
	Total		113,688.90
143	Brought forward		113,688.90
	Net income from oil sales giving effect to deductions which are applicable to all interests		$435,877.08
	Disposition of above:		
	George O. Baird partnership		$217,938.54
	Mrs. Thigpen and Mrs. Herold		108,969.27
	Messrs. Thigpen, Herold, Baird and Palmer		108,969.27
	Total		$435,877.08
	Summary of George O. Baird partnership income:		
	Distribution as shown above	$217,938.54	
	Less:		
	Depletion	$162,374.88	
	Depreciation 19816.83	13,149.96	
	Total	175,524.84	182,191.71
	Net income from oil sales	$42,413.70	35,746.83
	Income from sale of lease, computation of which is explained below	141,496.78	
	Total	$183,910.48	177,243.61

Less: Excess of partnership expense over partnership income as shown in revenue agent's report..		1,331.29	
Net distributable income...		$182,579.19	173,912.32
Summary of Thigpen-Herold income:			
Distribution as shown above.		$108,969.27	
Less:			
Depletion	$81,187.44		
Depreciation 9908.42	6,574.98	87,762.42	91,095.86
Income from oil sales.....		$21,206.85	17,873.41
Plus: Income from sale of oil lease explained below...		70,748.40	
Net distributive income		$91,955.25	88,621.81
Summary of Thigpen-Herold-Baird-Palmer income:			
Distribution as shown above.		$108,969.27	
Less:			
Depletion	$18,324.53		
Depreciation 144 9908.41	6,574.98	24,899.51	28,232.94
Income from oil sales.....		$84,069.76	80,736.33
Plus: Income from sale of oil leases as explained below		41,639.92	
Net distributive income		$125,709.68	122,376.25
Computation of the profit derived from the sale of oil leases during the year 1921			

accruing to the George O. Baird partnership interest and the Thigpen-Herold interest:		
Sale price		$350,000.00
¾ interest of the above		$262,500.00
Remaining cost of the depletable property sold:		
George O. Baird, Partnership	$2,218.72	
Thigpen and Herold	1,109.36	
Total	$3,328.08	
Remaining cost of depreciable property sold	46,926.74	50,254.82
Profit		$212,245.18
Distribution of the above:		
George O. Baird, Partnership		$141,496.78
Thigpen and Herold		70,748.40
Total		$212,245.18

Computation of profit on sale of oil leases during 1921 accruing to the Thigpen-Herold-Baird-Palmer interest:		
Sale price		$350,000.00
One-fourth thereof to the above		87,500.00
Remaining cost of depreciable property sold	$29,830.95	
Remaining cost of depreciable property sold	16,029.13	45,860.08
Profit		$41,639.92

145 1922.

Total income shown by revenue agent's report, Schedule 5-A	$195,642.13

Less deductions applicable to all interests:		
Surety bonds	$ 350.00	
Office and Journal expense	584.85	
Commissions	31,202.00	
Auto and team expense	162.83	
Taxes	1,344.65	
Loss on sale of team and wagon	210.75	
Loss on sale of auto	698.73	
Total		34,553.81
Income from the above		$161,088.32
Distribution thereof:		
George O. Baird, Partnership		80,544.16
Mrs. Thigpen and Mrs. Herold		40,272.08
Messrs. Thigpen, Herold, Baird and Palmer		40,272.08
Total		$161,088.32
Summary of George O. Baird partnership income:		
Distribution as shown above		$80,544.16
Less:		
Depletion	$5,816.82	
Partnership depreciation as shown in revenue agent's report	1,570.70	7,387.52
Net distributive income		$73,156.64
Summary of Thigpen-Herold income:		
Distribution as shown above		40,272.08
Less: Depletion		2,908.41
Net distributive income		$37,363.67

Summary of Thigpen-Herold-Palmer-Baird income:	
Distribution as shown above.....	40,272.08
Less: Depletion	3,922.10
Net distributive income	$36,349.98

146 The result of the computation of the tax liability for the various individuals involved in which effect will be given to the adjustments explained above will be communicated to each by separate letter.

Respectfully,
C. R. NASH,
Assistant to the Commissioner,

By (Signed) A. LEWIS,
Head of Division.

12-28-26.

Two copies of the letter mailed to Internal Agent in Charge.

A. W. K.,
Clerk.

rtc/dng-4.

RTC. 12-14-26.
JRC 12-16-26.
ARN 12-21-26.

Filed May 26, 1930.

147 EXHIBIT "V."

Form NP-2.

Treasury Department,
Washington.

Office of Commissioner of Internal Revenue.

IT:PA:PYA-60D.
ARM.

Dec. 21, 1926.

Mr. E. G. Palmer,
2024 Fairfiled Avenue,
Shreveport, Louisiana.

Sir:

An audit of your 1921 and 1922 income tax returns in connection with an examination of your books of account and records disclose a deficiency in tax amounting to $167,209.92. The adjustments made are shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D:ARM.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR, Commissioner.

By .....,
Assistant to the Commissioner.

Inclosures:
Statement.
Form A.

Form 332—:PM-3.
Form 7861-Revised Mar., 1926.
Government Printing Office 2-13281.

148 Statement.

IT:PA:PYA-60-D.
ARM.

Dec. 21, 1926.

In Re: Mr. E. G. Palmer, 2024 Fairfield Avenue, Shreveport, Louisiana.

Year.	Deficiency in Tax.
1921 (Waiver expires December 31, 1926)	$129,138.75
1922	38,071.17
Total	$167,209.92

The report of the Internal Revenue Agent in Charge at New Orleans, Louisiana, dated January 24, 1924, has been revised and approved except as follows:

1921.

A reaudit of the partnership return of J. E. Smitherman (Special account) discloses your distributive share of the earnings to be $731,987.84.

Adjustments made with respect to the George O. Baird partnership income and the Thigpen-Herold-Baird-Palmer interest in the Langston lease discloses your income from these sources to be $36,515.84 and $31,427.42 respectively. The manner of arriving at these amounts has been explained in a letter addressed to the partnership of Geo. O. Baird.

Consideration of the information on file in this office relative to the amount of depletion allowable as a deduction against oil royalties results in the allowance of $8,372.99. The allowance of this deduction results in a net income of $5,331.85 from this source instead of $13,704.84 as shown by the examining officer's report.

Your total net income giving effect to the above adjustments has been determined to be $873,142.82, one-half of which is being taxed to your wife in accordance with the community property law of Louisiana.

Proper effect has been given in the computation of tax liability to the application of Article 13, Regulation 62, relative to the manner of computing surtax on profits derived from the sale of mineral deposits both as to the Smitherman partnership income and to the sale of the Langston lease.

1922.

As a result of a reaudit of the partnership return of J. E. Smitherman (Special Account) your distributive share of the earnings has been determined to be $196,-296.03.

Adjustments made with respect to the George O. Baird partnership income and the Thigpen-Herold-Baird-Palmer interest in the Langston lease discloses your distributive interest from these sources to be $14,631.33 and $9,087.50 as explained in a letter addressed to the partnership and mailed concurrently with this.

149 Consideration of the information on file in this office relative to the amount of depletion allowable as a deduction against oil royalties results in the allowance of $2,509.97.

Computation of your net income giving effect to the above adjustments results in a total net income of $238,356.59, one-half of which is being taxed to your wife in accordance with the community property law of Louisiana.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue and remittance should then be made to him.

12-28-1926.

Two copies of this letter mailed to Internal Revenue Agent in Charge.

A. W. K.
Clerk.

ATC:PM-3.

R. T. C.	R-J. R.C.	A. R. M.	A. L.
12-13-26	12-16-26	12-21-2 6	12-20-26

Filed May 26, 1930.

150 EX. "H."

Oil and Gas Lease.

The State of Louisiana,
Parish of Claiborne.

Know all men by these presents: That Mrs. Anna Taylor, wife of W. Z. Taylor, deceased, and G. W. Tay-

lor, J. L. Taylor, A. H. Taylor, Mrs. Pearl Waller, wife of J. T. Waller, Mrs. Jewell Camp, wife of H. P. Camp, Mrs. Ruby Beene, wife of Loy L. Beene, being the only heirs at law to the Estate of W. Z. Taylor, of the Parish of Claiborne, State of Louisiana, have and by these presents do hereby demise, let and lease unto Jos. E. Smitherman, Shreveport, La., hereinafter styled Lessee, its successors and assigns, the tract of land hereinafter described, for the purpose of exploiting the same for, and the production of minerals therefrom; and to that end also grant the exclusive right of drilling and operating thereon for oil or gas and other minerals, together with a right of way for, and a right to lay pipe lines, to convey water, oils, steam and gas, and the right to have and use sufficient water, oil, gas and coal from the premises to drill and operate any wells that it may bore, or shaft it may excavate, or in treating, so as to make merchantable any of such minerals, and also such other privileges as are reasonably requisite for the conduct of said operations, and the right to remove, at any time, from such premises, any and all property which may have been placed thereon by said Lessee. The said premises as to which this instrument does apply are described as follows:

Situated in Claiborne Parish, State of Louisiana, The North one-half of NE¼, and NW¼, Section fourteen (14) and SE¼ of NE¼ Section fifteen (15) all Township twenty-three (23) North Range Eight (8) West, containing 280 acres more or less.

To have and to hold unto the said Lessee, successors and assigns, for the term and under the provisions, as follows, to-wit:

First. There is hereby expressly granted to said lessee the right at any time before the expiration of

twelve months from this date to begin operations of drilling a well for oil or gas on said premises, and also the right to extensions of time in which to begin such operations, for successive periods of six (6) months, on condition that the said lessee shall, on or before the first day of each such respective six months period pay to Mrs. Anna Taylor, and et als., Haynesville, La., on deposit to their credit in the Planters Bank of Haynesville, La., Louisiana, the sum of one hundred forty and no/100 ($140.00) Dollars; provided, that if such payment shall not be made on or before the first day of each such respective six months period, then and on such default, this lease shall wholly determine; and provided, further, that these successive periods in which the right may be acquired to begin the operation of drilling a well in search for oil or gas shall not exceed 3 in the aggregate five (5) years from this date, and if such operations shall not be begun on or before the 3 expiration of said five (5) years from this date, then this lease shall wholly terminate.

Second. If said lessee shall avail itself of the right herein granted and begin operations of drilling a well on said premises, then from and after the beginning of such operations, said lessee shall not be required to make any further money payments hereunder; provided, however, if the said lessee shall begin such operations of drilling a well but shall fail to prosecute such operations with reasonable diligence, then this lease shall become of no effect.

If the Lessee shall begin such operations of drilling a well either within the fixed period from this date. as above provided, or within any extension period for which it may have paid as above provided, then said

lessee shall have the right to make as many attempts to find oil or gas as it pleases, and to continue the exercise of such right as long as it pleases, even beyond said term of five years from this date; provided only, such attempts shall be successive in the sense that until oil or gas be found not more than sixty days shall elapse between the cessation or abandonment of work on one well and the beginning of work on another.

Third. If, in the exercise of the right hereby conferred, oil or gas be found in paying quantities on said land, then the lessee shall deliver as royalty to said Mrs. Anna Taylor and et als free of expense, one-eighth (1/8) part of all the oil saved from
151 that produced, such delivery to be made either in tanks with connection by Lessor provided, or into any pipe line that may be connected with the well; and if any well on said premises produces gas in paying quantities, and such gas is used or marketed off the premises by said Lessee, then the said Mrs. Anna Taylor and et als shall be paid at the rate of three hundred dollars per year for each and every such well, such payments to be made at the end of each such year.

Fourth. If, as a result of any explorations under this contract, any other minerals than oil or gas shall be found in quantities deemed by the lessee to be paying, then it shall have the right to mine for and produce same, paying to the lessors what, under all circumstances, may be reasonable royalty.

Fifth. It is expressly declared that if oil, gas or other minerals, or any of them, be found in paying quantities, then the said lessee shall become at once vested with the exclusive right to produce the same, and any one or more or all of same, as long as any one of said minerals can be produced in paying quantities.

Sixth. It is agreed that without the written consent of both parties hereto, no well shall be drilled within two hundred (200) feet of the present buildings on said premises, and that the use of the surface of the land is hereby granted only so far as may be necessary to conduct mining operations, including the saving, storing and transporting the minerals.

Seventh. If, prior to any discovery of oil on said leased premises, and while this agreement shall be in force, there shall be drilled on adjacent property, and within fifty (50) feet of any line of said leased premises a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days, the lessee agrees that it will with all reasonable diligence begin and prosecute the drilling of a well on said leased premises in a faithful effort to find and produce therefrom oil in paying quantities.

Eighth. It is further agreed that all the conditions and terms herein shall extend to the heirs, executors, legal representatives, successors and assigns, of the parties hereto.

The lessee has this day paid to the said Mrs. Anna Taylor et als the sum of One Hundred Forty and no/100 ($140.00) Dollars, the receipt whereof is hereby acknowledged, and which payment is received in full satisfaction of any and every right hereby granted, including the right to extend the privilege of exploration of said land.

Thus done, read and signed by the parties hereto, the said lessors and said lesee acting by its agent, in the presence of the undersigned S. L. Beene and A. H. Southern, good and competent witnesses, and before me, the undersigned notary public, in and for the

Parish of ....., State of Louisiana, on this the 3rd day of March, A. D. 1919.

MRS. ANNA TAYLOR,
G. W. TAYLOR,
J. L. TAYLOR,
MRS. PEARL WALLER,
J. T. WALLER,
MRS. RUBY BEENE,
LOY L. BEENE,
MRS. JURAL CAMP,
H. P. CAMP,
A. H. TAYLOR,
Lessors.

J. E. SMITHERMAN,
Lessee.

J. C. McEACHERN,
Notary Public in and for Claiborne Parish, Louisiana.

Witnesses:
S. J. BEENE,
A. H. SOUTHERN.

92 2388

Oil and Gas Lease.

Mrs. Anna Taylor, et als., to J. E. Smitherman, Shreveport, La.

Post Office address of Lessor Authorized to receive rent, is .....

Filed for Record this the 8 day of Mch., A. D. 1919, at 7/43 o'clock P. M.

F. F. MEADOWS,
Dy. Parish Clerk,

By .....,
Deputy.

Recorded Apr. 30, A. D. 1919, in Claiborne Parish Record of Conveyances, Book 10, Page 357.

F. F. MEADOWS,
Dy. Parish Clerk,
By .....,
Deputy.

152 EXHIBIT "I."

Petitioner's Exhibit No. 3.

Oil and Gas Lease.

The State of Louisiana,
Parish of Claiborne.

Know all men by these presents: That Mrs. Anna Taylor, wife of W. Z. Taylor, deceased, G. W. Taylor, J. L. Taylor, Mrs. Pearl Waller, wife of J. T. Waller, Mrs. Jural Camp, wife of H. P. Camp, Mrs. Ruby Beene, wife of L. L. Beene, A. H. Taylor, heirs at law for an undivided one-half interest, and G. W. Taylor for an undivided one-half interest, of the Parish of Claiborne, State of Louisiana, have and by these presents do hereby demise, let and lease unto Jas. E. Smitherman, Shreveport, La., hereinafter styled Lessee, its successors and assigns, the tract of land hereinafter described, for the purpose of exploiting the same for, and the production of minerals therefrom; and to that end also grant the exclusive right of drilling and operating thereon for oil or gas and other minerals, together with a right of way for, and a right to lay pipe lines, to convey water, oils, steam and gas, and the right to have and use sufficient water, oil, gas and coal from the premises to drill and operate any wells that it may bore, or shaft it may excavate, or in treating, so as to make merchantable any of such minerals,

and also such other privileges as are reasonably requisite for the conduct of said operations, and the right to remove, at any time, from such premises, any and all property which may have been placed thereon by said Lessee. The said premises as to which this instrument does apply are described as follows:

Situated in Claiborne Parish, State of Louisiana, The SE¼ of SW¼ Section Eleven (11) Township twenty-three (237) North Range Eight (8) West containing 40 acres more or less.

153 To have and to hold unto the said Lessee, successors and assigns, for the term and under the provisions, as follows, to-wit:

First. There is hereby expressly granted to said lessee the right at any time before the expiration of twelve months from this date to begin operations of drilling a well for oil or gas on said premises, and also the right to extensions of time in which to begin such operations, for successive periods of six (6) months, on condition that the said lessee shall, on or before the first day of each such respective six months period pay to Mrs. Anna Taylor, and et als., Haynesville, La., on deposit to their credit in the Planters Bank of Haynesville, Louisiana, the sum of twenty and no/100 ($20.00) Dollars; provided, that if such payment shall not be made on or before the first day of each such respective six months period, then and on such default, this lease shall wholly determine; and provided, further, that these successive periods in which the right may be acquired to begin the operation of drilling a well in search for oil or gas shall not exceed in the aggregate three (3) years from this date, and if such operations shall not be begun on or before the expiration of said three (3) years from this date, then this lease shall wholly terminate.

Second. If said lessee shall avail itself of the right herein granted and begin operations of drilling a well on said premises, then from and after the beginning o such operations, said lessee shall not be required to make any further money payments hereunder; provided, however, if the said lessee shall begin such operations of drilling a well but shall fail to prosecute such operations with reasonable diligence, then this lease shall become of no effect.

154 If the lessee shall begin such operations of drilling a well either within the fixed period from this date as above provided, or within any extension period for which it may have paid as above provided, then said lessee shall have the right to make as many attempts to find oil or gas as it pleases, and to continue the exercise of such right as long as it pleases, even beyond said term of three years from this date; provided only, such attempts shall be successive in the sense that until oil or gas be found not more than sixty days shall elapse between the cessation or abandonment of work on one well and the beginning of work on another.

Third. If, in the exercise of the right hereby conferred, oil or gas be found in paying quantities on said land, then the lessee shall deliver as royalty to said Mrs. Anna Taylor and et als free of expense, one-eighth (1/8) part of all the oil saved from that produced, such delivery to be made either in tanks with connection by lessor provided, or into any pipe line that may be connected with the well, and if any well on said premises produces gas in paying quantities, and such gas is used or marketed off the premises by said lessee then the said Mrs. Anna Taylor and et als shall be paid at the rate of three hundred dollars per year for each and every such well, such payments to be made at the end of each such year.

Fourth. If, as a result of any explorations under this contract, any other minerals than oil or gas shall be found in quantities deemed by the lessee to be paying, then it shall have the right to mine for and produce same, paying to the lessor what, under all circumstances, may be reasonable royalty.

155 Fifth. It is expressly declared that if oil, gas or other minerals, or any of them, be found in paying quantities, then the said lessee shall become at once vested with the exclusive right to produce the same, and any one or more or all of same, as long as any one of said minerals can be produced in paying quantities.

Sixth. It is agreed that without the written consent of both parties hereto, no well shall be drilled within two hundred (200) feet of the present buildings on said premises, and that the use of the surface of the land is hereby granted only so far as may be necessary to conduct mining operations, including the saving, storing and transporting the minerals.

Seventh. If, prior to any discovery of oil on said leased premises, and while this agreement shall be in force, there shall be drilled on adjacent property, and within fifty (50) feet of any line of said leased premises a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days, the lessee agrees that it will with all reasonable diligence begin and prosecute the drilling of a well on said leased premises in a faithful effort to find and produce therefrom oil in paying quantities.

Eighth. It is further agreed that all the conditions and terms herein shall extend to the heirs, executors, legal representatives, successors and assigns, of the parties hereto.

The lessee has this day paid to the said Mrs. Anna Taylor and et als the sum of Twenty and no/100 ($20.00) Dollars, the receipt whereof is hereby acknowledged, and which payment is received in full satisfaction of any and every right hereby granted, including the right to extend the privilege of
156 exploration of said land.

Thus done, read and signed by the parties hereto, the said lessor and said lessee acting by its agent, in the presence of the undersigned S. L. Beene and A. H. Southern, good and competent witnesses, and before me, the undersigned notary public, in and for the Parish of Claiborne, State of Louisiana, on this the 3rd day of March, A. D. 1919.

(Signed) MRS. ANNA TAYLOR,
(Signed) G. W. TAYLOR,
(Signed) J. L. TAYLOR,
(Signed) MRS. PEARL WALLER,
(Signed) J. T. WALLER,
(Signed) MRS. RUBY BEENE,
(Signed) LOY L. BEENE,
(Signed) MRS. JURAL CAMP,
(Signed) H. P. CAMP,
(Signed) A. H. TAYLOR,
Lessors.
(Signed) J. E. SMITHERMAN,
Lessee.
(Signed) J. C. McEACHERN,
Notary Public in and for Claiborne Parish, Louisiana.

Witnesses:
(Signed) S. J. BEENE,
(Signed) A. H. SOUTHERN.

Filed May 26, 1930.

157 EXHIBIT "J."

Petitioner's Exhibit No. 4.

Oil and Gas Lease.

The State of Louisiana,
Parish of Claiborne.

Know all men by these presents: That, I, H. P. Camp, married man, living with first and only wife, Jural Camp, nee (Taylor), of the Parish of Claiborne, and State of Louisiana, has and by these presents does hereby demise, let and lease unto J. E. Smitherman of Shreveport, La., hereinafter styled lessee, its successors and assigns, the tract of land hereinafter described, for the purpose of exploiting the same for, and the production of minerals therefrom; and to that end also grant the exclusive right of drilling and operating thereon for oil or gas and other minerals, together with a right of way for, and a right to lay pipe lines, to convey water, oils, steam and gas, and the right to have and use sufficient water, oil, gas and coal from the premises to drill and operate any wells that it may bore, or shaft it may excavate, or in treating, so as to make merchantable any of such minerals, and also such other privileges as are reasonably requisite for the conduct of said operations, and the right to remove, at any time, from said premises, any and all property which may have been placed thereon by said lessee. The said premises as to which this instrument does apply are described as follows:

Situated in Claiborne Parish, State of Louisiana, The West ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ Sec. 15 and S. W. ¼ of S. E. ¼ and 24 acres on South side of S. E. ¼ of S. E. ¼ Sec. 10 and 10 acres in S. W. corner of S. W. ¼ of S. W. ¼ Sec. 11 all in township 23

Range 8 West and N. W. ¼ of N. E. ¼ Sec. 24 Township 23 Range 8 containing in all 234 acres more or less.

158 To have and to hold unto the said Lessee, successors and assigns, for the term and under the provisions, as follows, to-wit:

First. There is hereby expressly granted to said lessee the right at any time before the expiration of twelve months from this date to begin operation of drilling a well for oil or gas on said premises, and also the right to extensions of time in which to begin such operations, for successive periods of six (6) months, on condition that the said lessee shall, on or before the first day of each such respective six months period pay to H. P. Camp or deposit to his credit in the Citizens Bank of Haynesville, Louisiana, the sum of one hundred seventeen ($117.00) Dollars; provided that if such payment shall not be made on or before the first day of each such respective six months period, then and on such default, this lease shall wholly determine; and provided, further, that these successive periods in which the right may be acquired to begin the operation of drilling a well in search for oil or gas shall not exceed in the aggregate five (5) years from this date, and if such operations shall not be begun on or before the expiration of said five (5) years from this date, then this lease shall wholly terminate.

Second. If said lessee shall avail itself of the right herein granted and begin operations of drilling a well on said premises, then from and after the beginning of such operations, said lessee shall not be required to make any further money payments hereunder; provided, however, if the said lessee shall begin such operations of drilling a well but shall fail to prosecute such operations with reasonable diligence, then this lease shall become of no effect.

159 If the lessee shall begin such operations of drilling a well either within the fixed period from this date as above provided, or within any extension period for which it may have paid as above provided, then said lessee shall have the right to make as many attempts to find oil or gas as it pleases, and to continue the exercise of such right as long as it pleases, even beyond said term of five years from this date; provided only, such attempts shall be successive in the sense that until oil or gas be found not more than sixty days shall elapse between the cessation or abandonment of work on one well and the beginning of work on another.

Third. If, in the exercise of the right hereby conferred, oil or gas be found in paying quantities on said land, then the lessee shall deliver as royalty to said H. P. Camp, free of expense, one-eight (1/8) part of all the oil saved from that produced, such delivery to be made either in tanks with connection by lessor provided, or into any pipe line that may be connected with the well; and if any well on said premises produces gas in paying quantities, and such gas is used or marketed off the premises by said lessee then the said H. P. Camp shall be paid at the rate of $300.00 per year for each and every such well, such payments to be made at the end of each such year.

Fourth. If, as a result of any explorations under this contract, any other minerals than oil or gas shall be found in quantities deemed by the lessee to be paying, then it shall have the right to mine for and produce same, paying to the lessor what, under all circumstances, may be reasonable royalty.

Fifth. It is expressly declared that if oil, gas or other minerals, or any of them, be found in paying quantities, then the said lessee shall become at once

vested with the exclusive right to produce the same, and any one or more or all of same, as long as any one of said minerals can be produced in paying quantities.

Sixth. It is agreed that without the written consent of both parties hereto, no well shall be drilled within two hundred (200) feet of the present buildings on said premises, and that the use of the surface of the land is hereby granted only so far as may be necessary to conduct mining operations, including the saving, storing and transporting the minerals.

Seventh. If, prior to any discovery of oil on said leased premises, and while this agreement shall be in force, there shall be drilled on adjacent property, and within fifty (50) feet of any line of said leased premises a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days, the lessee agrees that it will with all reasonable diligence begin and prosecute the drilling of a well on said premises in a faithful effort to find and produce therefrom oil in paying quantities.

Eighth. It is further agreed that all the conditions and terms herein shall extend to the heirs, executors, legal representatives, successors and assigns, of the parties hereto.

The lessee has this day paid to the said H. P. Camp the sum of one hundred seventeen ($117.00) dollars, the receipt whereof is hereby acknowledged, and which payment is received in full satisfaction of any and every right hereby granted, including the right to extend the privilege of exploration of said land.

Thus done, read and signed by the parties hereto, the said lessor and said lessee acting by its agent, in

the presence of the undersigned W. P. Baumann and C. E. Miller, good and competent witnesses, and before me the undersigned notary public, in and for
161 the Parish of Claiborne, State of Louisiana, on this the 14th day of Feb., A. D. 1919.

(Signed) H. P. CAMP, Lessor.
(Signed) J. E. SMITHERMAN, Lessee.
(Signed) A. H. SOUTHERN, Notary Public in and for Claiborne Parish, Louisiana.

Witnesses:
(Signed) W. P. BAUMANN,
(Signed) C. E. MILLER.

Filed May 26, 1930.

162 EXHIBIT "K."

Petitioner's Exhibit No. 5.

Oil and Gas Lease.

The State of Louisiana,
Parish of Claiborne.

Know all men by these presents: That, G. W. Taylor, an unmarried man, of the Parish of Claiborne, and State of Louisiana, has and by these presents does hereby demise, let and lease unto J. E. Smitherman of Shreveport, hereinafter styled lessee, its successors and assigns, the tract of land hereinafter described, for the purpose of exploiting the same for, and the production of minerals therefrom; and to that end also grant the exclusive right of drilling and operating thereon for oil and gas and other minerals, together with a right of way for, and a right to lay pipe lines, to con-

vey water, oils, steam and gas, and the right to have and use sufficient water, oil, gas and coal from the premises to drill and operate any wells that it may bore, or shaft it may excavate, or in treating, so as to make merchantable any of such minerals, and also such other privileges as are reasonably requisite for the conduct of said operations, and the right to remove, at any time, from said premises, any and all property which may have been placed thereon by said lessee. The said premises as to which this instrument does apply are described as follows:

Situated in Claiborne Parish, State of Louisiana, Ten (10) acres out of S. E. Corner of SW ¼ of SW ¼ Section Eleven (11) Township Twenty-three (23) North, Range Eight (8) West, containing 10 acres more or less.

163 To have and to hold unto the said Lessee, successors and assigns, for the term and under the provisions, as follows, to-wit:

First. There is hereby expressly granted to said lessee the right at any time before the expiration of twelve months from this date to begin operations of drilling a well for oil or gas on said premises, and also the right to extensions of time in which to begin such operations, for successive periods of six (6) months, on condition that the said lessee shall, on or before the first day of each such respective six months period pay to G. W. Taylor, Haynesville, La., or deposit to his credit in the Planters Bank of Haynesville, La., the sum of Five and no/100 ($5.00); provided, that if such payment shall not be made on or before the first day of each such respective six months period, then and on such default, this lease shall wholly determine; and provided, further, that these successive periods in which the right may be acquired to begin the operation of

drilling a well in search for oil or gas shall not exceed in the aggregate five (5) years from this date, and if such operations shall not be begun on or before the expiration of said five (5) years from this date, then this lease shall wholly terminate.

Second. If said lessee shall avail itself of the right herein granted and begin operations of drilling a well on said premises, then from and after the beginning of such operations, said lessee shall not be required to make any further money payments hereunder; provided, however, if the said lessee shall begin such operations of drilling a well but shall fail to prosecute such operations with reasonable diligence, then this lease shall become of no effect.

164 If the lessee shall begin such operations of drilling a well either within the fixed period from this date as above provided, or within any extension period for which it may have paid as above provided, then said lessee shall have the right to make as many attempts to find oil or gas as it pleases, and to continue the exercise of such right as long as it pleases, even beyond said term of five years from this date; provided only, such attempts shall be successive in the sense that until oil or gas be found not more than sixty days shall elapse between the cessation or abandonment of work on one well and the beginning of work on another.

Third. If, in the exercise of the right hereby conferred, oil or gas be found in paying quantities on said land, then the lessee shall deliver as royalty to said G. W. Taylor, free of expense, one-eighth (1/8) part of all oil saved from that produced, such delivery to be made either in tanks with connection by lessor provided, or into any pipe line that may be connected with the well; and if any well on said premises pro-

duces gas in paying quantities, and such gas is used or marketed off the premises by said lessee then the said G. W. Taylor shall be paid at the rate of $300.00 per year for each and every such well, such payments to be made at the end of each such year.

Fourth. If, as a result of any explorations under this contract, any other minerals than oil or gas shall be found in quantities deemed by the lessee to be paying, then it shall have the right to mine for and produce same, paying to the lessor what, under all circumstances, may be reasonable royalty.

Fifth. It is expressly declared that if oil, gas or other minerals, or any of them, be found in paying quantities, then the said lessee shall become at once vested with the exclusive right to produce the same, and any one or more or all of same, as long
165 as any one of said minerals can be produced in paying quantities.

Sixth. It is agreed that without the written consent of both parties hereto, no well shall be drilled within two hundred (200) feet of the present buildings on said premises, and that the use of the surface of the land is hereby granted only so far as may be necessary to conduct mining operations, including the saving, storing and transporting the minerals.

Seventh. If, prior to any discovery of oil on said leased premises, and while this agreement shall be in force, there shall be drilled on adjacent property, and within fifty (5) feet of any line of said leased premises a well producing as much as two hundred (200) barrels of oil per day for thirty (3) consecutive days, the lessee agrees that it will with all reasonable diligence begin and prosecute the drilling of a well on said leased premises in a faithful effort to find and produce therefrom oil in paying quantities.

Eighth. It is further agreed that all the conditions and terms herein shall extend to the heirs, executors, legal representatives, successors and assigns, of the parties hereto.

The lessee has this day paid to the said G. W. Taylor the sum of Five and no/100 ($5.00) Dollars, the receipt whereof is hereby acknowledged, and which payment is received in full satisfaction of any and every right hereby granted, including the right to extend the privilege of exploration of said land.

Thus done, read and signed by the parties hereto, the said lessor and said lessee acting by its agent, in the presence of the undersigned S. L. Beene and E. J. Waller, good and competent witnesses, and before me the undersigned notary public, in and for
166 the Parish of Claiborne, State of Louisiana, on this the 14th day of Feb., A. D. 1919.

(Signed) G. W. TAYLOR, Lessor,
(Signed) J. E. SMITHERMAN,
Lessee.
(Signed) A. H. SOUTHERN,
Notary Public in and for Claiborne Parish, Louisiana.

Witnesses:
(Signed) S. L. BEENE,
(Signed) E. J. WALLER.

Filed May 26, 1930.

167 EX. L.

State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me T. M. Milling, Notary

Public in and for said Parish and State, duly commissmissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared, that for the consideration hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty, unto the Gilliland Oil Company, a Corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice-President, R. C. Gilliland, duly authorized hereto by Resolution of the Board of Directors, of said corporation, a certified copy of which is attached hereto, its successors and assigns,

An undivided one-half interest in and to that certain mineral lease executed by Mrs. Annie Taylor et al on March 3rd, 1919, in favor of J. E. Smitherman, filed for record on the 8th day of March, 1919, and recorded on the 30th day of April, 1919, in Book 10, folio 35, Conveyance records of Claiborne Parish, Louisiana, in so far as same covers and effects the Northwest quarter of Northwest quarter (NW¼ of NW¼) of Section Fourteen (14), Township Twenty-three (23) North of Range Eight (8) West, containing forty acres more or less,

Together with a like interest in the oil well thereon known as Taylor Number Two (2), with all the machinery, appurtenances and attachments thereto belonging; Eight steel storage tanks having a total capacity of Seven thousand barrels together with the oil therein, and the oil in earthern storage heretofore produced by the well known as Taylor No. 2, whether
168 situated on the above described property or not.

Also a like interest in and to the drilling well known as Taylor Number Four (4), subject however to the obligation of assignee to pay and discharge one-half of the cost and expenses of drilling said well, all situated in Claiborne Parish, Louisiana.

To have and to hold unto the said Purchasers, its successors and assigns, subject to the terms and conditions of said mineral leases.

The consideration for which this sale and assignment is made, is the sum and price of six hundred thousand ($600,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, and full discharge and acquittance granted for same.

The said parties declared that it is understood between the parties to this agreement that all conditions between the parties hereto extend to their heirs, executors, administrators and assigns.

Thus done and passed at my office in said Parish of Caddo, in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this 21st day of April, A. D. Nineteen Hundred and Twenty-one.

JAMES E. SMITHERMAN,
GILLILAND OIL CO.,
By R. C. GILLILAND, Vice-Pres.

Attest:
SAM W. MASON,
E. G. PALMER.

T. M. MILLING,
(Seal) Notary Public in and for
Caddo Parish, Louisiana.

169 Certificate.

State of Oklahoma,
County of Tulsa, ss.
To Whom It May Concern:

I, J. W. Hayes, Secretary of the Gilliland Oil Company, a Delaware Corpoartion, do hereby certify that at a Special Meeting of the Board of Directors of the Gilliland Oil Company held in accordance with the By-Laws of said Corporation at its office at Tulsa, Oklahome, on the 20th day of April, 1921, the following resolution was duly offered, passed and adopted by the Board:

"Whereas, certain negotiations have been carried on and conducted relative to the purchase by this Company of an interest in and oil and gas leasehold embracing approximately 2500 acres in Township 23 N., Range 8 W., near Haynesville, Claiborne Parish, Louisiana:

Whereas, in the opinion of this Board, after due investigation and consideration, the purchase of an interest in said property is to the best interests of the Company, and

Whereas, it is deemed advisable to appoint and empower some member of this Board to complete the negotiations for such purchase and perfect the same;

Therefore, be it resolved, that R. C. Gilliland be, and he is, hereby authorized and empowered to do any and all things which may be necessary to complete the negotiations and consummate the purchase of an interest in said property on behalf of this Company and to act on behalf of this Company in accepting the same upon such terms, stipulations, conditions, covenants and agreements as said R. C. Gilliland shall deem

fit and proper, with full and complete authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and concerning the premises and to execute on behalf of this company any and all instruments necessary to consummate the said purchase."

And that said resolution is duly spread of record on the minutes of said meeting.

In witness whereof, I have hereunto subscribed my name as Secretary and have caused the Corporate Seal of said Corporation to be hereto affixed this 20th day of April, 1921.

J. W. HAYES,
Sect'y.

(Seal)

170 18232.

James E. Smitherman Assignment to Gilliland Oil Co.

Filed for Record at 11/45 A. M., Apr. 22, 1921.
S. R. NEWSOM,
Deputy Clerk, D. C.

Duly recorded on page 603-604, Book "27", Conveyance Records, Claiborne Parish, La., 31 day of May, 1921.

L. E. KILPATRICK, C. D. C.

(Seal)

171 EX. "M."

State of Louisiana,
Parish of Caddo.

Know all men by these presents that this agreement is made and entered into by and between James E. Smitherman, married to Ina Thompson, a resident of

Shreveport, said Parish and State, hereinafter designated as party of the first part, and the Gilliland Oil Company, a corporation organized under the laws of the State of Delaware, authorized to do business in the City of Shreveport, Caddo Parish, Louisiana, herein appearing through R. C. Gilliland, duly authorized and empowered hereto, all as will appear by resolution of the Board of Directors of the said corporation, attached hereto and by reference made a party hereof, hereinafter called party of the second part,

Witnesseth:

That for and in consideration of the sum and price of Seven Hundred and Fifty Thousand Dollars ($750,000.00), to be paid in cash and property as hereinafter set forth, party of the first part binds and obligates himself to sell, assign and set over unto the party of the second part, and party of the second part agrees to buy, without warranty, but with full subrogation of all rights and actions of warranty, unto said party of the second part, its successors and assigns, and for the particular consideration set forth, the following described property, to-wit:

First. An undivided one-half interest in and to the mineral leases covering

Northwest Quarter (NW¼) of Northwest Quarter (NW¼) of Section Fourteen (14), Township 23 North, Range 8 West, and the South Half (½) of Southwest Quarter (SW¼) of Southwest Quarter (SW¼) of Section Eleven (11), Township 23 North, Range 8 West, Claiborne Parish, Louisiana,

together with the oil well thereon known as Taylor No. 2, and all drilling wells and equipment, tankage, derricks, etc., situated upon said lease, together with all the oil produced from said well known as Taylor

No. 2, whether situated upon said property or not, for the consideration of the sum and price of Six Hundred Thousand Dollars, ($600,000.00).

172 Second. An undivided one-half interest in and to leases covering an amount of acreage checkerboarded throughout grantor's leases known as Haynesville acreage and situated in Township 23 North, Ranges Six (6), Seven (7), and Eight (8) West, Claiborne Parish, Louisiana, and in Township 20 South, Range 19 West, Columbia County, Arkansas, equal to approximately one-eighth (1/8) of the acreage owned by the said party of the first part in each and every section in which he owns leases in said area, the total amount of acreage owned by him being approximately Twenty Thousand (20,000) acres and the amount which he is transferring an undivided one-half (½) interest herein being Twenty-five hundred (2500) acres, more or less, for and in consideration of the sum and price of One Hundred and Fifty Thousand Dollars ($150,000.00), the said acreage being more particularly described and set out on a map thereof, reference to which is hereby made, and the said party of the first part agrees to accept as a part of the consideration to be paid by party of the second part for the property as above stated, at a valuation of Two Hundred and Fifty Thousand Dollars ($250,000.00) an undivided one-half interest in and to party of the second part's Tank Farm situated at Minden, Louisiana, together with all of the tanks thereon, loading racks, machinery, pump stations, spur tracks, right of way and equipment, piping, attachments and appurtenances thereto belonging except Eight (8) tanks, at present partially filled with oil, together with the ground upon which said eight tanks stand; the number of tanks herein transferred being guaranteed by party of the second part to be not less than Fifteen (15) in number, with a total capacity of Seven Hundred and Fifty Thousand (750,000) barrels:

And an undivided one-half interest in and to party of the second part's Six Inch Pipe Line known as "Number 2 line" and constructed from the said above described Tank Farm to its "Shaw-C" pump station in Section 25, Township 21 North, Range 8 West, in the Homer oil field, together with a like interest in the right of way and telephone line thereon constructed and a like interest in and to the pump station situated on said lease and constituting a part of the said pipe line, with all the buildings and machinery thereunto belonging and an undivided one-half (½) interest in and to a Six Inch pipe line and right of way therefor, and telephone lines and pump stations therefor, to be built and constructed from said "Shaw-
173 C" lease in said Homer field to the

Southwest Quarter (SW¼) of Southwest Quarter (SW¼) of Section 14, Township 23 North, Range 8 West,

at the entire expense and cost of party of the second part.

In selling the above described leases and in acquiring said above described pipe line and appurtenances thereto, it is agreed and understood that the said property shall be operated as a partnership property, but that party of the second part shall have the control and supervision thereof, it being agreed and understood, however, that party of the second part shall confer with party of the first part, his agent, or assigns, with reference to the general policy of drilling and exploiting the said above described leases and marketing and otherwise disposing of the said oil.

It is agreed and understood that if party of the second part does not desire to market the oil produced from the above described leases in due course, that

party of the first part shall have the right to sell his equal one-half (½) thereof from the loading rack or Tank Farm, as above stated, upon such terms and for such price as to him may seem fit, or to deliver a sufficient amount of said oil to pay party of the first part's portion of expenses of exploiting said properties, to party of the second part on the basis and for the price that is paid by the Standard Oil Company Pipe Line at that time for a like grade and quality of oil currently produced and marketed from the Caddo Parish Oil field, it being agreed and understood that oil produced from Taylor No. 2 well is equal in grade and quality to Caddo 38 gravity; settlement for said oil to be made on or before the 15th day of the month succeeding that on which same is produced.

It is agreed and understood that party of the first part shall pay one-half (½) of all the expenses necessary and incident to exploiting, developing and producing oil and gas from said above described leases and for the marketing thereof as crude oil, at the loading rack or pipe line connection at the Tank Farm at Minden, Louisiana, together with the necessary expense and upkeep of operating the said pipe line, tank farm and other marketing facilities, together with a like proportion of all rentals, renewals and other expenses made necessary and incidental to keeping the said above described leases in full force and
174 effect on or before the 15th day of the month succeeding that on which said expenses are incurred.

It is further agreed and understood that if party of the second part should desire to manufacture casing head gasoline, that all manufacturing plants made necessary for the purpose of manufacturing said casing head gasoline and all facilities for marketing same at Haynesville, Louisiana, shall be borne equally by the parties hereto and the profits derived therefrom shall likewise be shared equally by the parties hereto.

It is further agreed and understood that party of the second part shall have the right of ingress and egress in, on and over any and all leases now owned by the party of the first part in Claiborne Parish, Louisiana, for the purpose of building and constructing pipe lines, gathering pipe lines, pump stations, water lines and other facilities made necessary for the exploitation of the leases in and to which an undivided one-half (½) interest is herein transferred.

It is agreed and understood by and between the parties hereto that party of the first part shall bear no office or overhead expense made necessary by the above outlined operations for a period of two (2) years, but that the party of the first part shall lend such assistance and co-operation as is necessary and reasonable within his power in the way of securing right of way for a pipe line, assisting in clearing the titles of all defects and encumbrances and otherwise aiding in similar matters pertaining to said leases.

Party of the second part agrees to take over from the said James E. Smitherman his contract with Smitherman and McDonald, covering the drilling of the well known as Taylor No. 4 and agrees to carry out his contract with the said Smitherman & McDonald to the extent of two (2) additional wells on the basis of Twenty-five Thousand Dollars ($25,000.00) per well, turn-key jobs.

It is agreed and understood by and between the parties hereto that party of the second part shall pay over and deliver to the lessors or their assigns, of the premises hereinabove described, the stipulated royalty due to said lessors or their assigns, in accordance with the terms of the said leases on or before the 15th day of the month succeeding that during which the
175 oil is removed from the premises.

It is agreed and understood that party of the second part shall begin the construction for the extension of its pipe line from "Shaw-C" lease to the Haynesville field on April 19, 1921, and shall prosecute the building thereof with reasonable diligence to its completion, for the purpose of taking oil; and party of the second part guarantees it shall be completed not later than May 5th, 1921.

It is also agreed and understood by and between the parties hereto that the State, parish and local taxes for the year 1921 upon said pipe line, tank farm and appurtenances thereto, shall be paid in proportion of one-fourth (¼) by party of the first part and three-fourths (¾) by party of the second part.

It is also agreed and understood that as a part and parcel of this transfer that party of the first part will assign to party of the second part his rights to one-half of all water and water rights acquired by him from S. T. Hunt of Haynesville, Louisiana, on property situated in Sections 9 and 16, Township 23 North, Range 8 West, as per agreement of record in the Conveyance Records of Claiborne Parish, Louisiana.

In witness whereof the parties hereto have hereunto signed their names in duplicate in the presence of E. G. Palmer and Thos. M. Milling, two competent witnesses, on this 18th day of April, A. D. 1921.

(Signed) JAMES E. SMITHERMAN,
GILLILAND OIL COMPANY, INC.,
(Signed) By R. C. GILLILAND.

Witnesses:
(Signed) E. G. PALMER,
(Signed) T. M. MILLING.

Filed May 26, 1930, W. B. Lee, Clerk, U. S. Dist. Court, West. Dist. of La.

176 EXHIBIT "R".

State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me, T. M. Milling, Notary Public in and for said Parish and State, duly commissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wifes' maiden name was Ina Thompson, a resident of the City of Shreveport, said parish and State, who declared that for the consideration hereinafter set forth, he has and does by these presents, sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty unto the Gilliland Oil Company a corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice President, R. C. Gilliland, duly authorized hereto, by Resolution of the Board of Directors, of said Corporation, a certified copy of which is attached hereto, its successors and assigns, An undivided one half interest in all right, title and interest in and to the following described mineral leases, in so far as they apply to the leases hereinafter described.

1. The lease of S. A. Carter to J. E. Smitherman, in so far as same covers and effects the North West quarter of South East quarter and North Half of North East quarter of South West Quarter of Section Six, Township Twenty Three, North of Range Six, West.

2. The lease of John Bailey, in favor of J. E. Smitherman in so far as it covers and effects the North West quarter of Southeast Quarter, and South Half

of South West Quarter of North East Quarter of Section Seventeen, Township Twenty Three North of Range Six West.

3. Lease of J. W. Burley to J. E. Smitherman, in so far as same covers and effects the South West Quarter of South East Quarter of Section Seven-
177 teen, Township Twenty Three, North of Range Six, West.

4. Lease of W. T. Owen to J. E. Smitherman, in so far as it covers and effects Thirty acres off of the West side of the North West quarter of North East quarter, of Section Nineteen, Township Twenty Three, North of Range Six West, and lease of said W. T. Owens to J. E. Smitherman, in so far as it effects and covers North Half of North West quarter of Section Twenty Township Twenth Three, North of Range Six west; Lease of W. T. Owen, to J. E. Smitherman in so far as it covers and effects the South West quarter of South West Quarter of Section Twenty One, Township Twenty Three North of Range Six West.

5. That certain mineral lease of S. Smith to J. E. Smitherman, in so far as it covers and effects the South Half of South West quarter and North East quarter of South West quarter of Section Two, Township Twenty Three North of Range Seven West.

6. That certain mineral lease of T. W. Ware to J. E. Smitherman, covering and effecting the South Half of North West quarter and West half of North West quarter of North West Quarter of Section Three, Township Twenty three North of Range Seven west.

7. That certain mineral lease of Alfred J. Smith to J. E. Smitherman, in so far as it covers and effects the East Half of North West quarter of section Four, Township Twenty Three north of Range Seven West.

8. That certain lease of C. C. Crump to J. E. Smitherman, in so far as same covers and effects the North West quarter of North West quarter of Section Five, Township Twenty Three North of Range Seven West.

9. That certain lease of J. E. Yates to J. E. Smitherman in so far as same covers and effects the North West quarter of North West Quarter of Section Six, Township Twenty Three North of Range Seven West.

178 10. That certain lease of J. E. Yates in favor of J. E. Smitherman in so far as it covers and effects the North West quarter of South West quarter of Section Seven, Township Twenty Three north of Range Seven West.

11. That certain lease of T. M. Crump to J. E. Smitherman in so far as it covers and effects the South East quarter of North West quarter of Section Eight, Township Twenty Three North or Range Seven West.

12. That certain lease of B. C. Crump et al to J. E. Smitherman in so far as same covers and effects the North East Quarter of the South East Quarter of Section Nine, Township Twenty three North of Range Seven West.

13. That certain mineral lease of S. O. Brasier, to J. E. Smitherman, in so far as same covers and effects the North Half of South East quarter of South East Quarter of Section Nine, Township Twenty Three, North of Range Seven West.

14. That certain mineral lease of Jessie F. Smith to J. E. Smitherman, in so far as it covers and effects the North West quarter of North East quarter of Section Ten, Township Twenty Three North of Range Seven West.

15. That certain mineral lease of J. L. Tally to J. E. Smitherman, in so far as it covers and effects the South West Quarter of North West quarter of Section Eleven, Township Twenty Three, North of Range Seven West.

16. That certain mineral lease of Jack Glover to J. E. Smitherman, in so far as it covers and effects the North West quarter of North West Quarter of Section Thirteen, Township Twenty three North of Range Seven West.

17. That certain mineral lease of Ruben Wynn to J. E. Smitherman, in so far as it covers and effects the North West quarter of North West quarter of section Fourteen, Township Twenty three, North of Range Seven West; and North half of South East quarter of North East quarter of Section Fifteen Township Twenty Three North of Range Seven West.

18. That certain mineral lease of Ed White to J. E. Smitherman, in so far as it covers and effects the South Half of South East Quarter of
179 North East Quarter of Section Sixteen Township Twenty Three North of Range Seven West.

19. That certain mineral lease of W. B. Mitchener to J. E. Smitherman, in so far as it covers and effects the North East quarter of South East quarter of Section Sixteen, Township Twenty three North of Range Seven West.

20. That certain mineral lease of J. E. Powell to J. E. Smitherman, in so far as it covers and effects the South East Quarter of South East Quarter of Section Eighteen, Township Twenty three, North of Range Seven West.

21. That certain mineral lease of G. L. Yates to J. E. Smitherman, in so far as it covers and effects the North East Quarter of South East Quarter of Section Twenty, Township Twenty Three North of Range Seven West.

22. That certain mineral lease of C. C. Miller to J. E. Smitherman, in so far as it effects the South East quarter of South East quarter of Section Twenty Township Twenty Three North, Range Seven West.

23. That certain mineral lease of Longino and Goode to J. E. Smitherman, in so far as it covers and effects the North East Quarter of South East quarter of Section Twenty Two, Township Twenty Three North of Range Seven West, and the South Half of South East quarter of Section Twenty Three, Township Twenty Three North of Range Seven West.

24. That certain mineral lease of J. W. Brum to J. E. Smitherman, in so far as it covers and effects the South West Quarter of South East Quarter of Section Twenty Seven, Township Twenty Three, North of Range Seven West.

25. That certain mineral lease of Mrs. Sarah F. Green to J. E. Smitherman, in so far as it covers and effects the West Half of South East quarter of Section Twenty Eight, Township Twenty Three North of Range Seven West.

26. That Certain mineral lease of Mrs. Sarah A. Kendrick et al to J. E. Smitherman, in so far as same covers and effects the West half of South East quarter of South West quarter of Section Thirty Two, Township Twenty Three North of Range Seven West.

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27. That certain mineral lease of S. C. Waller to J. E. Smitherman, in so far as same covers and effects the East half of South West Quarter of Section One, Township Twenty Three North of Range Eight West, less about ten acres on the North side thereof owned by Lloyd L. Beene.

28. That certain mineral lease of Lloyd L. Beene to J. E. Smitherman, in so far as same covers and effects the North East Quarter of South West Quarter of Section One, Township Twenty Three, North of Range Eight West, or any part thereof, owned by or belonging to Lloyd L. Beene. It being the intention of assignor to assign in the lease above named and described only the whole of the East half of South West Quarter of Section One, said Township and Range.

29. That certain mineral lease of J. T. Waller to J. E. Smitherman, in so far as same covers and effects the West Half of South West Quarter of Section Two, Township Twenty Three North of Range Eight, West.

30. That certain mineral lease of J. A. Seegers, to J. E. Smitherman, in so far as same covers and effects the West half of South West Quarter of Section Three, Township Twenty Three, North of Range Eight West.

31. That certain mineral lease of J. W. Whaley to J. E. Smitherman, in so far as same covers and effects the South West Quarter of South East Quarter of Section Four, Township Twenty Three, North of Range Eight West.

32. That certain mineral lease of J. M. Hunt to J. E. Smitherman, in so far as same covers and effects the South East Quarter of North West Quarter of Section Four, Township Twenty Three, North of Range Eight, west.

33. That certain mineral lease of J. B. & J. H. Garrett to J. E. Smitherman, in so far as same covers and effects the South West Quarter of North East quarter of Section Eight Township Twenty
181 Three North of Range Eight West.

34. That certain mineral lease of Sydney T. Hunt to J. E. Smitherman, in so far as same covers and effects the South East quarter of South West Quarter of Section Eight, Township Twenty Three North of Range Eight West.

35. That certain mineral lease of J. M. Hunt to J. E. Smitherman, in so far as same covers and effects the South East Quarter of North West quarter of Section Nine, Township Twenty Three, North of Range Eight West.

36. That certain mineral lease of J. A. Seegers to J. E. Smitherman, in so far as same covers and effects the North West Quarter of South East Quarter of Section Nine, Township Twenty Three, North of Range Eight West.

37. That certain mineral lease of T. W. Sherman to J. E. Smitherman, in so far as same covers and effects the West Half of South West quarter of Section Ten, Township Twenty Three North of Range Eight West.

38. That certain mineral lease of S. C. Waller to J. E. Smitherman, in so far as same covers and effects the South Half of South West quarter of North West quarter; East half of North West Quarter of South West quarter and North half of South West quarter of South West Quarter, all in Section Eleven, Township Twenty Three, North of Range Eight West.

39. That certain mineral lease of Guy W. Taylor, to J. E. Smitherman, in so far as same covers and effects the South East Quarter of the South West Quarter of the South West Quarter, of Section Eleven, Township Twenty three North of Range Eight West.

40. That certain mineral lease of H. P. Camp, to J. E. Smitherman, in so far as same covers and effects the South West quarter of South West Quarter of the South West Quarter of Section Eleven, Township Twenty Three North of Range Eight West.

182 41. That certain mineral lease of J. T. Waller to J. E. Smitherman, in so far as same covers and effects the North West Quarter of South West Quarter of Section Twelve, Township Twenty Three North of Range Eight West.

42. That certain mineral lease of Mrs. Ada Miller, to J. E. Smitherman, in so far as same covers and effects the South West Quarter of South West quarter of Section Twelve Township Twenty Three North of Range Eight West.

43. That certain mineral lease of F. M. Taylor to J. E. Smitherman, in so far as same covers and effects the North Twenty five acres of the North West Quarter of the South West Quarter of Section Thirteen, Township Twenty Three, North of Range Eight West.

44. That certain mineral lease of S. C. Waller to J. E. Smitherman, in so far as same covers and effects the South West quarter of South West quarter, and Fifteen acres off of the South side of North West Quarter of South West quarter all in Section Thirteen, Township Twenty Thtree North of Range Eight west.

45. That certain mineral lease of G. W. Taylor to J. E. Smitherman, in so far as same covers and effects the West Half of South West quarter of Section Fourteen, Township Twenty Three North of Range Eight West.

46. That certain mineral lease of J. H. Goodwin to J. E. Smitherman, in so far as same covers and effects the West half of North West quarter of South West Quarter and South East Quarter of North West quarter of South West quarter of Section Fifteen, Township Twenty three North of Range Eight West.

47. That certain mineral lease of J. W. Coon et al to J. E. Smitherman, covering and effecting the North East quarter of North West quarter of South West quarter of Section Fifteen Township Twenty Three North of Range Eight West.

48. That certain mineral lease of R. P. Bond, to J. E. Smitherman, in so far as same covers and effects the South West quarter of South West quarter
183 of Section Fifteen, Township Twenty Three North of Range Eight west.

49. That certain mineral lease of A. N. Stonecipher, to J. E. Smitherman, in so far as same covers and effects the South Half of North East quarter of South West quarter of Section Sixteen, Township Twenty Three North of Range Eight West.

50. That certain mineral lease of R. L. Bond to J. E. Smitherman, in so far as same covers and effects the South Half of South East quarter of South West Quarter of Section Sixteen, Township Twenty Three North of Range Eight west and the East Half of North West quarter of Section Twenty One, Township Twenty three North of Range Eight West.

51. That certain mineral lease of W. E. DeLocah to J. E. Smitherman, in so far as same covers and effects the West Half of South West Quarter of Section Twenty Two, Township Twenty Three North of Range Eight West.

52. That certain mineral lease of L. L. Sherman et al to J. E. Smitherman, in so far as same covers and effects the West Half of South West Quarter of Section Twenty Three, Township Twenty Three, North of Range Eight West.

53. That certain mineral lease of L. L. Garrett to J. E. Smitherman, in so far as same covers and effects the South Half of North East quarter of South West Quarter and the North West quarter of North East quarter of South West quarter of Section Twenty Four, Township Twenty Three, North of Range Eight West, and North Half of North West quarter of North West quarter of Section Twenty Five, Township Twenty three North of Range Eight West.

54. That certain mineral lease of J. R. Sherman to J. E. Smitherman, in so far as same covers and effects the North Half of North East Quarter of North East quarter of Section Twenty Six, Township Twenty Three, North of Range Eight West.

55. That certain mineral lease of Lizzie Harp to J. E. Smitherman, in so far as same covers and effects the South Half of North East quarter of
184 North East quarter of Section Twenty Six, Township Twenty Three North of Range Eight West.

56. That certain mineral lease of G. F. Shaw to J. E. Smitherman in so far as same covers and effects

the South Half of North West quarter of South West quarter of Section Thirty Four, Township Twenty Three, North of Range Eight West.

And being an undivided one half interest in leases covering approximately Twenty five hundred acres of land all in Claiborne Parish, Louisiana.

To have and to hold unto the said purchasers, its successors and assigns, subject to the terms and conditions contained in said mineral leases.

This sale and assignment is made for and in consideration of the price and sum of One Hundred and Forty nine Thousand ($149,000.00) Dollars, cash in hand paid the receipt of which is hereby acknowledged and full discharge and acquittance given and granted for same.

Said parties declared that it is understood between the parties to this agreement that all conditions between the parties hereunto extend to their heirs, executors, administrators, successors and assigns.

Thus done and passed in my office, in said Parish of Caddo in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this the 21st day of April, A. D. Nineteen Hundred and Twenty One.

JAMES E. SMITHERMAN,
GILLILAND OIL CO.,
By R. C. GILLILAND,
Vice President.

Attest:
SAM W. MASON,
E. G. PALMER.

T. M. MILLING,
(Seal) Notary Public in and for Caddo Parish, Louisiana.

185 CERTIFICATE.

State of Oklahoma,
County of Tulsa. ss.
To Whom it may Concern:

I, J. W. Hayes, Secretary of the Gilliland Oil Company, a Delaware Corporation, do hereby certify that at a Special Meeting of the Board of Directors of the Gilliland Oil Company held in accordance with the By-Laws of said Corporation at its office at Tulsa, Oklahoma, on the 20th day of April, 1921, the following resolution was duly offered, passed and adopted by the Board:

"Whereas, certain negotiations have been carried on and conducted relative to the purchase by this company of an interest in an oil and gas leasehold embracing approximately 2500 acres in Township 23 N., Range 8 W. near Haynesville, Claiborne Parish, Louisiana;

Whereas, in the opinion of this Board, after due investigation and consideration, the purchase of an interest in said property is to the best interests of the Company, and

Whereas, it is deemed advisable to appoint and empower some member of this Board to complete the negotiations for such purchase and perfect the same;

Therefore, be it resolved, that R. C. Gilliland be, and he is, hereby authorized and empowered to do any and all things which may be necessary to complete the negotiations and consummate the purchase of an interest in said property on behalf of this company and to act on behalf of this company in accepting the same upon such terms, stipulations, conditions, covenants and agreements as said R. C. Gilliland shall deem fit and proper, with full and complete authority to do

and perform all and every act and thing whatsoever requisite and necessary to be done in and concerning the premises and to execute on behalf of this company any and all instruments necessary to consummate the said purchase."

And that said resolution is duly spread of record on the minutes of said meeting.

In witness whereof, I have hereunto subscribed my name as Secretary and have caused the Corporate Seal of said Corporation to be hereto affixed this 20th day of April, 1921.

(Seal) J. W. HAYES, Sec'ty.

Attest, a true copy.

186 United States of America,

State of Louisiana, Second Judicial District Court, for the Parish of Claiborne.

I, Fred F. Meadows, Clerk of the Second Judicial District Court and Ex-Officio Recorder for the Parish of Claiborne, State of Louisiana, do hereby certify that the attached and foregoing photostatic picture and copy is a true, complete and exact copy of act of assignment between Jas. E. Smitherman and Gilliland Oil Company, dated April 21, 1921, and filed for record April 22, 1921, as original No. 18233, of the Conveyance Records of Claiborne Parish, Louisiana.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Homer, in said State, on this the 15th day of November, 1928.

FRED F. MEADOWS,
Clerk of Court and Ex-Officio Recorder, Claiborne Parish, Louisiana.

I, John S. Richardson, presiding Judge of the Second Judicial District Court in and for the Parish of Claiborne, do hereby certify that Fred F. Meadows is the Clerk of said Court and Ex-Officio Recorder for the Parish of Claiborne, State of Louisiana; that same is a Court of record, having probate jurisdiction, and that the signature of "Fred F. Meadows", Clerk of Court and Ex-Officio Recorder, Claiborne Parish, Louisiana, to the foregoing certificate is in the proper handwriting of him, the said Fred F. Meadows, Clerk of Court and Ex-Officio Recorder; to his official acts as such faith and credit are due and owing; and I do certify further that his attestation is in due form of law.

Given under my hand at Homer, Louisiana, on the 15th day of November, 1928.

JOHN S. RICHARDSON,
Judge.

I, Fred F. Meadows, Clerk of the Second Judicial District Court in and for the Parish of Claiborne, State of Louisiana, do hereby certify that John S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court for the Parish of Claiborne, duly elected, commissioned and qualified as such and that said attestation is in due form of law.

Witness my hand and seal of said Court at Homer, Louisiana, on this the 15th day of November, 1928.

FRED F. MEADOWS,
(Seal) Clerk of Court.

Filed May 26, 1930, W. B. Lee, Clerk, U. S. District Court, Western District of La.

187 EX "N."

State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me Sam W. Mason, a Notary Public duly commissioned and sworn in and for said Parish and State, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled in the City of Findlay, County of Hancock, State of Ohio, herein appearing for the purpose of accepting this assignment through its agent and attorney in fact, O. D. Donnell, Vice President, duly authorized and empowered hereto by a resolution of the Board of Directors of said Company, a certified copy of which is attached hereto, and by reference made part hereof, the following described property situated in the Parish of Claiborne, State of Louisiana, and particularly described as follows, towit:

That certain oil, gas and mineral lease acquired by James E. Smitherman, from Mrs. Annie Taylor et al, dated March 3rd, 1919, and recorded April 30th, 1919, in Conveyance Book 10, page 35, of Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

East half ($E\frac{1}{2}$) of Northwest quarter ($NW\frac{1}{4}$) and Southwest quarter ($SW\frac{1}{4}$) of Northwest quarter ($NW\frac{1}{4}$) of Section 14, Township 23 North, Range 8 West, containing one hundred twenty acres more or less.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same
188 covers and effects that portion herein assigned.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of three million dollars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver unto said assignor, his heirs, executors and assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his heirs or assigns.

It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman, his heirs and assigns, shall share in the profits derived from the manufacture of said product to the extent of an undivided one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

The appearers further declared that it is agreed and understood by and between them that the deferred payments to be made out of the oil, as well as settlements for the one-eighth (1/8) excess royalty herein above stipulated, shall be made on or before the 15th day of the month succeeding that during
189 which the oil is removed from the premises.

In witness whereof, the said James E. Smitherman and the said The Ohio Oil Company, acting through its said agent and attorney in fact, have hereunto signed their names in the presence of me, Notary, and E. G. Palmer and Mrs. R. T. Layne, two competent witnesses, at my office in the City of Shreveport, in said Parish and State on this 23rd day of April, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL CO..
By O. D. DONNELL,
Vice-President.

Witnesses:
E. G. PALMER,
MRS. R. T. LAYNE.

SAM W. MASON,
(Seal) Notary Public.

190 18364.

James E. Smitherman to The Ohio Oil Company.

Assignment.

Filed for record at 4/51 P. M., Apr. 25, 1921.
S. R. NEWSOM,
Deputy Clerk, D. C.

Duly recorded on page 25, Book 28, Conveyance Records, Claiborne Parish, La., 4th day of June, 1921.
L. E. KILPATRICK, C. D. C.

1.25—11.25.

191 EX. O.

Memorandum of Agreement, made and entered into this 12th day of July, by and between James E. Smitherman, of Shreveport, Louisiana, hereinafter referred to as Smitherman, and The Ohio Oil Company, an Ohio corporation, hereinafter referred to as the Ohio, Witnesseth:

Whereas: By the terms of certain assignments from James E. Smitherman to the Ohio Oil Company conveying to said Company certain interest in oil and gas leases in Claiborne Parish, State of Louisiana, and in the County of Columbia, State of Arkansas, said instruments of assignment being recorded in Book 45, page 392, records of Columbia County, Arkansas, and in Book 28, pages 15 to 25 inc., of the conveyance records of Claiborne Parish, Louisiana, the Ohio Oil Company agreed to pay over and deliver to the said Smitherman the equal one-eighth (1/8) part of all oil produced and saved from the premises so assigned.

Now, therefore, this agreement to provide for gathering, storing and disposing of such one-eighth interest.

In consideration of the sum of one dollar each to the other paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants herein contained it is agreed as follows:

First: The Ohio shall have control of said Smitherman one-eighth interest. with the right to place in storage commingled with the Ohio's oil or any other oil that may be stored in such tanks from the Smitherman leases, for as long as it shall think wise, all or any part of said interest, and the right at any time to sell with the Ohio's portion of the oil, any part or all of such interest at the price the Ohio shall at the time be re-

ceiving for its oil run from the tank farm in the Haynesville, La., field, settlement for oil sold to be made on or before the 15th day of the month succeeding that in which the oil is so sold, such settlements to be made subject to any deductions that may be made by the Pipe Line Company at the time the oil is run.

In consideration whereof the Ohio agrees, upon the payment to it by said Smitherman of the sum of fifteen hundred dollars ($1,500.00) to convey to Smitherman an undivided one-eighth (1/8) part of the interest acquired by it in and to the following described land: The Northwest quarter (NW¼) and the Northwest quarter of the Southwest quarter (NW¼ SW¼) less 15 acres off of the South side of said last described tract, all in Section 13, Township 23 North, Range 8 West, Claiborne Parish, Louisiana, containing 185 acres, more or less, upon which are now being erected oil storage tanks, the Ohio reserving to itself however, the one one hundred and twenty-eighth (1/128) royalty interest acquired by it by deed of conveyance from Frank M. Taylor.

192

Second: It is further agreed that Smitherman shall have and own an undivided one-eighth interest in all tanks erected on said land upon the payment to the Ohio of an equal one-eighth of the cost of all such tanks now on said land or to be erected thereon, payment to be made promptly upon receipt of bills from the Ohio.

Third: The Ohio agrees further that it will construct the necessary gathering lines at its own expense, convey the oil to storage tanks, and market the Smitherman one-eighth interest for a consideration of eight cents (8¢) per barrel payable on or before the 15th day of the month following that during which the oil is run into the storage tanks.

Fourth: It is agreed further that Smitherman shall pay to the Ohio the one-eighth part of any charge that may be made by the Louisiana and Northwest Railroad on account of the construction and maintenance of a railroad siding on said tank farm and now being used for the transportation of tank material.

Fifth: Smitherman agrees to join with the Ohio in the execution of any division orders required to accomplish the sale of all or any part of the oil produced from the lands described in the assignments above referred to.

Sixth: It is further understood that the Ohio shall not be responsible for the loss of any of such oil so placed in storage, by reason of evaporation or fire, or otherwise, except that if the Ohio shall carry insurance on such oil Smitherman shall pay one-eighth of the cost of such insurance and be protected to the extent of his interest so insured.

In witness whereof the said James E. Smitherman has hereunto set his hand and the Ohio Oil Company has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereto affixed, the day and year first above written. This agreement shall be binding upon the heirs, successors and assigned of the parties hereto.

JAMES E. SMITHERMAN,

Witness:
S. L. BEENE,
E. B. REDPATH.

THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
Attest: (Seal) C. L. FLEMING, Secretary.
S. L. BEENE,
E. B. REDPATH.

193 State of Ohio,
County of Hancock, ss:

Before me, the undersigned authority, personally came and appeared James E. Smitherman, of Shreveport, La., and The Ohio Oil Company appearing through J. C. Donnell, its President, and C. L. Fleming, its Secretary, who declared to me said Notary that they executed the above and foregoing agreement in writing for the purposes and considerations therein set forth and in the presence of the subscribing witnesses hereto.

In witness whereof, the said appearers have hereunto signed their names in the presence of me a Notary in the presence of two competent witnesses in my office in said County and State on the 12th day of July, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Witnesses:
S. L. BEENE,
E. B. REDPATH.

W. R. HODGE,
(Seal) Notary Public.
My commission expires March 4, 1924.

194 EX ."P."

The Ohio Oil Co.

Shreveport, La., April 23, 1921.

Mr. J. E. Smitherman,
Shreveport, Louisiana.

Dear Sir:

With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred

twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North, Ranges 7 and 8 West, and in Twp. 23 North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender or cancel all or any part of any one or all of said leases then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors.

Yours very truly,
THE OHIO OIL COMPANY,
By J. K. KERR,
JKK:C. Vice-President.

195 EXHIBIT "Q".

State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me, Sam W. Mason, a Notary Public in and for said Parish and State, duly commissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price hereinafter set forth he has and does by these presents sell, assign, transfer, set over and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled at the City of Findlay, in said State, duly authorized to do business in the State of Louisiana,

with offices in the City of Shreveport, State of Louisiana, herein appearing for the purpose of accepting this assignment through its Vice-president, O. D. Donnell, duly authorized hereto by a resolution of the Board of Directors of said company, a certified copy of which is attached hereto and by reference made a part hereof, its successors and assigns, the following described oil, gas and mineral leases covering property situated in Claiborne Parish, Louisiana, and subject to the hereinbelow named reservations, to-wit:

196 1. Lease of Osco Lewis to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10 page 271 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of NW¼; SW¼ of NW¼ and NW¼ of SW¼ of Section 6, Township 23 North, Range 6 West, and W½ of NE¼ of NE¼ and SE¼ of NW¼ of Section 7, Township 23 North, Range 6 West.

2. Lease of A. Q. Bailey to J. E. Smitherman, dated July 18, 1920, and recorded on the 14th day of September, 1920, in Book 21, Page 455, Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of SE¼ of NW¼ of Section 8, Township 23 North, Range 6 West.

3. Lease of Ed. F. Evers to J. E. Smitherman, dated February 18, 1919, recorded on the 8th day of March, 1919, in Book 10, page 243, Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of SW¼ of Section 8, Township 23 North, Range 6 West, and NE¼ of NW¼ of Section 17, Township 23 North, Range 6 West, less 5 acres out of the Southeast corner thereof.

4. Lease of A. M. Evers to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10, page 241, Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the,

N½ of NE¼ and N½ of S½ of NE¼ of Section 17, Township 23 North, Range 6 West.

5. Lease of John P. Bailey to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, Book 10, page 195, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SE¼ of NW¼ and 5 acres out of the SE corner of NE¼ of NW¼ of Section 17, Township 23 North, Range 6 West.

6. Lease of J. A. Bailey to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10, page 191, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

197 S½ of SE¼ of NE¼ less 4 acres on the East side, thereof, of Section 17, Township 23 North, Range 6 West.

7. Lease of J. W. Burley to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10, page 215, Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the,

SE¼ of SW¼ of Section 17, Township 23 North, Range 6 West.

8. Lease of Amos Spirey to J. E. Smitherman, dated February 18, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 345, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the,

W½ of SW¼ and SW¼ of NW¼ of Section 17, and SE¼ of NE¼ and NE¼ of SE¼ of Section 18, Township 23 North, Range 6 West.

9. Lease of J. F. Gipson and Henry Baucum, to J. E. Smitherman, dated February 1st, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10, page 197, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of NE¼ and SE¼ of NW¼ and E½ of NE¼ of NW¼ of Section 18, Township 23 North, Range 6 West.

10. Lease of W. T. and Sidney W. Owens, to J. E. Smitherman, dated February 18, 1919, and recorded 10th October 14 391 on the 29th day of March 1919, in Book 12 page 227 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of NE¼ less 10 acres off of the East side thereof Section 19 and N½ of NE¼; SE¼ of NE¼ and E½ of SE¼ of Section 20, and W½ of NW¼; SE¼ of NW¼; N½ of SW¼; SE¼ of SW¼; and W½ of SE¼ of Section 21, and N½ of NE¼ of Section 28, Township 23 North, Range 6 West and W½ of NE¼ and E½ of NW¼ and N½ of SW¼ of Section 13, and SE¼ of Section 14, Township 23 North, Range 7 West, and also NW¼ of Section 19, Township 23 North, Range 6 West.

11. Lease of W. H. and J. E. D. Owens to J. E. Smitherman, dated February 18, 1919, and recorded on the 29th day of March, 1919, in Book 12, page 229 of Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

198 NE¼ of SW¼ of Section 19, Township 23 North, Range 6 West.

12. Lease of J. Earl Odom to J. E. Smitherman, dated February 24, 1919, and recorded on the 8th day of March, 1919, in Book 10, 297, of Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of NE¼; NW¼ of SE¼; NE¼ of SW¼ and SE¼ of NW¼ and that part of the SW¼ of NW¼ lying North and East of Colquit and Gordon public road, all in Section 20, Township 23 North, Range 6 West.

13. Lease of J. L. Ware to J. E. Smitherman, dated February 19, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 383 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of SE¼ of Section 2, Township 23 North, Range 7 West.

14. Lease of C. Smith to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 341 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the,

NW¼ and NW¼ of SW¼ of Section 2, Township 23 North, Range 7 West.

15. Lease of T. W. Ware to J. E. Smitherman, dated February 20, 1920, and recorded on the 8th day of March, 1920, in Book 19, page 631 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NE¼ of NE¼ and S½ of NE¼ of Section 3, Township 23 North, Range 7 West.

16. Lease of I. L. Modisette to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 291 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

NW¼ of NE¼; NE¼ of NW¼ and E½ of NW¼ of NW¼ of Section 3, Township 23 North, Range 7 West.

17. Lease of C. F. Smith to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 343 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

199 SE¼ of Section 3, less 12 acres in the Southeast corner thereof, Township 23 North, Range 7 West.

18. Lease of Jesse F. Smith to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, Book 10, page 339 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

13 acres off of the South side of the SE¼ of SE¼ of Section 3, Township 23 North, Range 7 West.

19. Lease of Mrs. Lela Meadors, et al. to J. E. Smitherman, dated September 30, 1919, recorded on the 15th day of October, 1919, in Book 14, page 413 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

SW¼ of Section 3, Township 23 North, Range 7 West, together with the oil well and derrick thereon, known and described as "Meadors No. 1".

20. Lease of Mrs. Betty Teague to J. E. Smitherman, dated August 9, 1919, and recorded on the 15th day of August, 1919, in Book 14, page 109 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of NE¼ of Section 4, Township 23 North, Range 7 West.

21. Lease of Alfred J. Smith to J. E. Smitherman, dated August 9, 1919, recorded on the 15th day of August, 1919, in Book 14, page 103 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of NW¼; NE¼ of SW¼ and SW¼ of SE¼ of Section 4, Township 23 North, Range 7 West, and E½ of NE¼ of Section 5, Township 23 North, Range 7 West, less that part thereof which lies West of the Haynesville and Chalebeate Springs road, owned by C. M. Smith, being about 10 acres thereof, more or less.

22. Lease of Clyde M. Smith to J. E. Smitherman, dated August 9, 1919, recorded on the 15th day of August, 1919, in Book 14, page 107, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

W½ of NE¼ and E½ of NW¼ of Section 5, and that part of the E½ of NE¼ of Section 5 which lies West of the Haynesville and Chalebeate Springs public road, all in Township 23 North, Range 7 West.

200 23. Lease of P. G. Smith to J. E. Smitherman, dated August 9th, 1919, recorded on the 15th day of August, 1919, in Book 14, page 105 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting, the

W½ of SE¼ and E½ of SW¼ of Section 5, Township 23 North, Range 7 West.

24. Lease of Clinton C. Crump to J. E Smitherman, dated November 6th, 1920, recorded on the 10th day of November, 1920, in Book 21, page 535 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of NW¼ and NW¼ of SW¼ of Section 5, Township 23 North, Range 7 West.

25. Lease of J. E. and O. E. Yates to J. E. Smitherman, dated February 13th, 1919, and recorded on the 8th day of March, 1919, in Book 10, Page 397 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NE¼ of NW¼; S½ of NW¼; SW¼; and SW¼ of SE¼ of Section 6, and NW¼ of NE¼ and NE¼ of NW¼ of Section 7, Township 23 North, Range 7 West.

26. Lease of James E. Yates to J. E. Smitherman, dated February 13th, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 403 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of NE¼ of Section 1, Township 23 North, Range 8 West, and SW¼ of NE¼ and SE¼ of NW¼ of Section 7, Township 23 North, Range 7 West.

27. Lease of Mrs. Georgia Crump to J. E. Smitherman, dated March 10th, 1919, and recorded on the 19th day of March, 1919, in Book 12, page 33 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

E½ of NE¼ of Section 7, Township 23 North, Range 7 West.

28. Lease of C. C. Hartsell to J. E. Smitherman, dated April 11, 1919, and recorded on the 21st day of April 1919, in Book 12, page 473 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting, the

S½ of SW¼ of Section 7, Township 23 North, Range 7 West.

201 29. Lease of John Matthew Winn to J. E. Smitherman, dated November 6, 1920, and filed for record on the 10th of November, 1920, document No. 14,732, and recorded in Book 21, page 534 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

S½ of SW¼ of Section 8, less 6 acres off of the North side of SE¼ of SW¼ of said section; and SE¼ of SE¼ & West 17 acres of NE¼ of SE¼ of Section 7, Township 23 North, Range 7 West.

30. Lease of T. M. Crump to J. E. Smitherman, dated February 15, 1919, recorded on the 8th day of March, 1919, in Book 10, page 233 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

SW¼ of NW¼ of Section 8, Township 23 North, Range 7 West.

31. Lease of George C. Crump to J. E. Smitherman, dated March 2, 1920, recorded on the 25th day of March, 1920, in Book 21, page 109 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

NW¼ of NW¼ of Section 9, Township 23 North, Range 7 West.

32. Lease of George C. Crump to W. P. Baucum, and assigned to J. E. Smitherman, dated September 2, 1919, and recorded on the 2nd day of September, 1919, in Conveyance Book 14, page 169 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

SW¼ of NW¼ of Section 9, Township 23 North, Range 7 West.

33. Lease of Clinton C. Crump to J. E. Smitherman, dated March 9, 1920, and recorded on the 25th day of March, 1920, in Book 21, page 111 of Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

SE¼ of NW¼ and SW¼ of SE¼ of Section 9, Township 23 North, Range 7 West.

34. Lease of S. O. Brasier to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 209 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the,

202 S½ of SE¼ of SE¼ of Section 9, and S½ of SW¼ of Section 10, Township 23 North, Range 7 West.

35. Lease of D. C. Crump, et al. to J. E. Smitherman, dated March 22, 1920, recorded on the 6th day of April, 1920, in Book 21, page 165 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

NW¼ of SW¼ of Section 10, Township 23 North, Range 7 West.

36. Lease of Jonah L. Talley to S. L. Beene, and assigned to J. E. Smitherman, dated February 10, 1919, recorded on the 5th day March, 1919, in Book 10, page 99 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

E½ of NE¼ of Section 10, Township 23 North, Range 7 West.

37. Lease of J. L. Talley to J. E. Smitherman, dated February 17, 1919, recorded on the 8th day of March, 1919, in Book 10, page 363 of the Conveyance Records of Claiborne Parish, insofar as same covers and effects the

S½ of SE¼ of Section 10, Township 23 North, Range 7 West.

38. Lease of J. L. Talley to J. E. Smitherman, dated February 20, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 349 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

N½ of NE¼ and E½ of NW¼ of Section 11, Township 23 North, Range 7 West.

39. Lease of Rube Winn to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day

of March, 1919, in Book 10, page 387 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

NE¼ of NW¼ and N½ of S½ of NW¼ of Section 14, and NE¼ of NE¼ of Section 15, Township 23 North, Range 7 West.

40. Lease of W. M. Kirkpatrick to J. E. Smitherman, dated March 3, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 267 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

203 S½ of S½ of NW¼ and 30 acres off of the North side of NW¼ of SW¼ of Section 14, Township 23 North, Range 7 West.

41. Lease of Ed White to J. E. Smitherman, dated February 18, 1919, recorded on the 8th day of March, 1919, in Book 10, page 393 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

NE¼ of Section 16, Township 23 North, Range 7 West, less S½ of SE¼ of NE¼ of said Section, Township and Range.

42. Lease of Robert Ivory to J. E. Smitherman, dated February 18th, 1919, recorded on the 8th day of March, 1919, in Book 10, page 265 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

S½ of NW¼ and N½ of SW¼ less 20 acres off of the South side thereof in Section 16, Township 23 North, Range 7 West.

43. Lease of William Evers to J. E. Smitherman, dated February 15, 1919, recorded on the 8th day of March, 1919, in Book 10, page 239 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

S½ of SW¼ and 20 acres off of the South side of the N½ of SW¼ of Section 16, Township 23 North, Range 7 West.

44. Lease of J. E. Powell to J. E. Smitherman, dated February 15, 1919, recorded on the 8th day of March, 1919, in Book 10, page 301 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

S½ of SW¼ of Section 17, and N½ of NW¼ of Section 20, Township 23 North, Range 7 West.

45. Lease of R. L. Rinicker to J. E. Smitherman, dated February 18, 1919, recorded on the 8th day of March, 1919, in Book 10, page 309 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

NE¼ of NE¼ and W½ of NE¼ and NW¼ of SE¼ of Section 18, Township 23 North, Range 7 West.

204 46. Lease of M. A. Morgan to J. E. Smitherman, dated February 15, 1919, recorded on the 8th day of March, 1919, in Book 10, page 295 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

NE¼ of SW¼ running East to the creek, thence down said creek across said NE¼ of SW¼; and SE¼ of SW¼ of Section 19, Township 23 North, Range 7 West, containing 60-1/3 acres, more or less.

47. Lease of E. J. Waller to J. E. Smitherman, dated February 27, 1919, recorded on the 8th day of March, 1919, in Book 10, page 371 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects

20 acres of the East side of the SW¼ of SW¼ of Section 19, Township 23 North, Range 7 West.

48. Lease of Hugh McDonald to J. E. Smitherman, dated March 7, 1919, and recorded March 13, 1919, in Book 10, page 513 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

13.24 acres on the West side of SW¼ of SW¼ of Section 19, Township 23 North, Range 7 West.

49. Lease of G. L. Yates to J. E. Smitherman, dated February 21, 1919, recorded on the 8th day of March, 1919, in Book 10, page 399 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

NW¼ of SE¼; N½ of SW¼ and SE¼ of SW¼ of Section 20, Township 23 North, Range 7 West, and E½ of SW¼ and 10 acres on the South side of the NE¼ of NW¼ of Section 21 Township 23 North Range 7 West.

50. Lease of C. E. Miller, et al. to J. E. Smitherman, dated February 24, 1919, recorded on the 8th day of March, 1919, in Book 10, page 287 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

SW¼ of SE¼ of Section 20; NE¼ of NE¼ of Section 29; NW¼ of NW¼ of Section 28, Township 23 North, Range 7 West.

51. Lease of J. A. Escoval to J. E. Smitherman, dated February 27, 1919, recorded on the 8th day of March, 1919, in Book 10, page 237, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

205 S½ of NE¼ of Section 21, and E½ of NW¼ of NW¼ of Section 22 and all that part of the NE¼ of NW¼ lying West of Middle Fork Creek, Section 22, Township 23 North, Range 7 West.

52. Lease of J. E. Maddox to J. E. Smitherman, dated February 21, 1919, recorded on the 8th day of March, 1919, in Book 10, page 277 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

S½ of SW¼ of Section 22 and 30 acres off of the East side of SE¼ of SE¼ of Section 21, Township 23 North, Range 7 West.

53. Lease of Longino and Goode to J. E. Smitherman, dated March 5, 1919, recorded on the 8th day of March, 1919, in Book 10, page 273 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the following described property:

W½ of W½ of Section 24; all that part of SW¼ of SW¼ of Section 13 South of Haynesville and Gordon road containing 33.85 acres, more or less. S½ of NE¼ of Section 23, SE¼ of Section 23, and S½ of NW¼ of Section 23 and SW¼ of Sec. 23 and all that part of S½ of NW¼ of NW¼ of Sec. 23 south of Haynesville and Gordon public road, containing 6.55 acres more or less, all that part of NE¼ of NW¼ of Section 23 south of Haynesville and Gordon road containing 18.55 acres. E½ of SE¼ of Section 22, SW¼ of SE¼ of Section 22 and all that part of

NW¼ of SE¼ of Section 22 which lies South of Haynesville and Gordon road containing 37.87 acres more or less, and all that part of SW¼ of NE¼ of Section 22 which lies Southeast of Haynesville and Gordon road, containing 5.13 acres more or less, all that part of SE¼ of NE¼ of Section 22 which lies south of Haynesville and Gordon public road containing 33.45 acres more or less; NE¼ of NE¼ of Section 27, NW¼ of NW¼ of Section 26, and all that part of NE¼ of NW¼ of Section 26 which lies west of Middle Fork Creek containing 33 acres more or less, and also that part of SW¼ of NE¼ of Section 26 lying south of Middle Fork Creek containing 34 acres more or less. Containing in all 1042.41 acres, all in Township 23 North, Range 7 West, less NE¼ of SE¼ of Section 22 and less S½ of SE¼ of Section 23, and less NW¼ of NW¼ of Section 26, and less NW¼ of NW¼ of Section 24, Township 23 North, Range 7 West.

54. Lease of W. H., J. E. D. and W. C. Owens to J. E. Smitherman, dated February 18, 1919, recorded on the 29th day of March, 1919, in Book 12, page 231 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

E½ of NW¼ of Section 24, Township 23 North, Range 7 West.

55. Lease of J. W. Burnham to J. E. Smitherman, dated February 27, 1919, recorded on the 8th day of March, 1919, in Book 10, page 213 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

206 S½ of SW¼ of Section 27 and SE¼ of SE¼ of Section 28 and NW¼ of NW¼ and 10 acres on the North side of NE¼ of NW¼ of Section 34, Township 23 North, Range 7 West.

56. Lease of J. W. Maddox to J. E. Smitherman, dated February 21, 1919, recorded on the 8th day of March, 1919, in Book 10, page 275 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

N½ of NE¼ of Section 28, Township 23 North, Range 7 West.

57. Lease of Mrs. Sarah Francis Green, to J. E. Smitherman dated February 27, 1919, recorded on the 8th day of March, 1919, in Book 10, page 251 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

SW¼ of NE¼ of Section 28 and NE¼ of Section 33, Township 23 North, Range 7 West.

58. v-Lease of J. C. Sherman to J. E. Smitherman, dated February 24, 1919, recorded on the 8th day of March, 1919, in Book 10, page 331 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

E½ of W½ and SW¼ of NW¼ of Section 28 and E½ of NW¼ and SW¼ of NW¼ of Section 33, Township 23 North, Range 7 West.

59. Lease of M. A. Winn to J. E. Smitherman, dated February 17, 1919, recorded on the 8th day of March, 1919, in Book 10, page 385 of the Conveyance Records; and lease of M. A. Winn, tutor, to J. E. Smitherman, dated May 17, 1920, recorded on the 27th day of May, 1920, in Book 21, page 331 of the Conveyance Records, Claiborne Parish, Louisiana, insofar as same cover and effect

SE¼ of NE¼ and 13 acres off of the East side of SW¼ of NE¼ and 10 acres off of the North side of the NE¼ of SE¼ of SE¼ Sec. 30, Township 23 North, Range 7 West.

60. Lease of Thomas S. Sale to J. E. Smitherman, dated March 5, 1920, recorded on the 18th day of March, 1920, in Book 21, page 73 of the Conveyance Records of Claiborne Parish, Louisiana, and supplemental lease dated April 22, 1920, recorded on the 26th day of April, 1920, in Book 22 page 414, of the Records of Claiborne Parish, Louisiana, in-
207 sofar as same cover and effect

SW¼ of SE¼; NE¼ of SW¼, less 11 acres off of the West side thereof, and all that portion of the NW¼ of Section 31 lying South of the Old Haynesville and Gordon public road all situated in Section 31; SW¼ and SW¼ of Section 32, Twp. 23 North, Range 7 West.

61. Lease of Mrs. Sarah A. Kendrick, et al. to J. E. Smitherman, dated May 20, 1920, recorded on the 27th day of May, 1920, in Book 21, page 329 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

N½ of SE¼ of Section 32, less 10 acres in the form of a square out of the Northwest corner thereof and SE¼ of SE¼ of Section 32 less 10 acres in the form of a square out of the Southeast corner thereof, Township 23 North, Range 7 West.

62. Lease of W. S. Callander to J. E. Smitherman, dated February 21, 1919, recorded on the 8th day of March, 1919, in Book 10, page 221 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

N½ of SW¼ of Section 33, Township 23 North, Range 7 West, less 10 acres off of the West side thereof.

63. Lease of B. T. Collier to J. E. Smitherman, dated March 11th, 1919, recorded on the 13th day of March, 1919, in Book 10 page 507 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects

S½ of NW¼; W½ of SW¼ and 26-2/3 acres off of the West side of the NE¼ of SW¼ of Section 34, Township 23 North, Range 7 West.

64. Lease of Q. Z. Burnham to J. E. Smitherman, dated February 27, 1919, recorded on the 8th day of March, 1919, in Book 10, page 211 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects

SW¼ of NE¼; NW¼ of SE¼; SE¼ of SW¼ and 13-1/3 acres off of the East side of the NE¼ of SW¼ of Section 34, Township 23 North, Range 7 West.

65. Lease of Eugene Beene to J. E. Smitherman, dated February 1, 1919, recorded on the 1st day of March, 1919, in Book 10, page 53, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

208 S½ of NW¼ of NW¼ and 10 acres off of the North side of the NW¼ of SW¼ of Section 2, Township 22 North, Range 7 West.

66. v-Lease of Eliza Callinder to J.. E. Smitherman, dated February 27, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 223 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting the

N½ of SW¼ of Section 3, Township 22 North, Range 7 West.

67. Lease of Dr. W. L. Hardaway to J. E. Smitherman, dated May 27, 1920, recorded on the 5th day of June, 1920, covering and effecting:

The NE¼ of SW¼, and the E½ of NW¼ of SW-¼ and that certain triangular tract of land described as follows: Beginning at the center of Section 6, and run in a Northwesterly course 38 chains and 12 links to the West side of Section 6, thence South to the Northwest corner of SW¼ of said Section 6, thence East to starting point, said triangular being bounded North and East by J. W. Tinsley tract, now belonging to T. S. Sale, on the West boundary line of Section six, and on the South by the North half of SW¼ of said Section Six and all being situated in Section six, Township Twenty-two North, Range Seven West, and containing seventy (70) acres, more or less.

68. Lease of Mrs. Mollie E. McKee, et al, to J. E. Smitherman, dated February 20, 1919, and recorded on the 8th day of March 1919, in Book 10 page 285 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

S½ of SE¼ of Section 7, Township 22 North, Range 7 West, and that part of SW¼ of NE¼ and that part of NE¼ of SW¼ of Section 1, Township 22 North, Range 8 West which lies South and East of Dixie Bayou.

69. Lease of R. B. Goodwin to S. L. Beene and assigned to J. E. Smitherman, dated March 3, 1919, recorded on the 11th day of March, 1919, in Book 10, page 415 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

E½ of SE¼ of SW¼ and 22 acres lying South of a certain road in the NE¼ of SW¼ of Section 9, Township 22 North, Range 7 West.

70. Lease of Loy L. Beene to J. E. Smitherman, dated March 4, 1919, recorded on March 8th, 1919, in Book 10, page 199 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

209 NW¼ and W½ of NE¼ and N½ of SE¼ of Section 1, Township 23 North, Range 8 West, also all that part of the SW¼ of NE¼ of Section 2 lying West of Military road less 2 acres in the Northwest corner thereof (140 yds. North and South by 70 yards East and West), also beginning at line dividing NE¼ of Section 2, running East & West at the Military road and run North 99 yards, thence West 120 yards, thence South 99 yards, thence East to starting point, Section 2, Township 23 North, Range 8 West. Also a tract as follows: Commencing at Northwest corner of SE¼ of NE¼, run South 165 yards, thence West to Military road thence North East to starting point, Section 2, Township 23 North, along said road to North line of said forty thence Range 8 West.

71. Lease of O. E. Yates to J. E. Smitherman, dated February 13, 1919, recorded on March 8th, 1919, in Book 10, page 401 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

S½ of SE¼ of Section 1, E½ of NE¼ and E½ of W½ of NE¼ of Section 12, Township 23 North, Range 8 West.

72. Lease of S. C. Waller, et al. to J. E. Smitherman, dated March 24, 1919, recorded on April 4, 1919, in Book 12, page 339 of the Conveyance Records of Claiborne Parish, La., insofar as same covers and effects,

E½ of E½ of Section 2, Township 23 North, Range 8 West, and 5 acres off of the South side of the SE¼ of SE¼ of Section 14, Township 23 North, Range 8 West.

73. Lease of J. T. Waller to J. E. Smitherman, dated February 28, 1919, recorded on March 13, 1919, in Book 10, page 525 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of SE¼ of Section 2 and that portion of E½ of NE¼ and NE¼ of SE¼ lying West of the old Military road and SW¼ of NE¼ and NW¼ of SE¼, all in Section 11, Township 23 North, Range 8 West; SE¼ of Section 14, less 5 acres off of the South side of SE¼ of SE¼ of said section and the NE¼ of NW¼ of Section 23, Township 23 North, Range 8 West; also E½ of SE¼ of Section 3, Township 23 North, Range 8 West.

74. Lease of S. C. Waller to J. E. Smitherman, dated March 21, 1919, and recorded on April 4, 1919, in Book 12, page 345 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects the

210 SW¼ of NE¼; S½ of NW¼ and NW¼ of NW¼ Section 2; NE¼ of NE¼; E½ of NW¼ of NE¼ and 5 acres off of North end of E½ of SW¼ of NE¼; E½ of SE¼ of NE¼ and 2 acres out of the Northwest corner of SE¼ of NE¼; and N½ of SE¼ of SE¼ less 4 acres off of the South side of the N½ of SE¼ of SE¼ of Section 10, Township 23 North, Range 8 West; also NE¼ and E½ of NW¼ of Section 3; and NW¼ of NW¼ and N½ of SW¼ of NW¼ and 5 acres out of the Northwest corner of NE¼ of NW¼ of Section 11, Township 23 North, Range 8 West.

75. Lease of Mrs. Anna Taylor, et al, to J. E. Smitherman, dated March 27, 1919, recorded April 4, 1919, in Book 12, page 337 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of SE¼ of Section 3, W½ of W¼ of NE¼ and NE¼ of NW¼ of Section 10, Township 23 North, Range 8 West.

76. Lease of J. A. Seegers to J. E. Smitherman, dated March 7, 1919, recorded on March 13, 1919, in Book 10, page 517 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of E½ of NE¼ and E½ of SE¼ of Section 4, and NE¼ of SE¼ and S½ of SE¼ of Section 9, Township 23 North, Range 8 West.

77. Lease of J. H. Whaley to J. E. Smitherman, dated March 7, 1919, recorded on the 13th day of March, 1919, in Book 10, page 523 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of E½ of NE¼; W½ of NE¼; NW¼ of SE¼ of Section 4; NE¼ of Section 9; W¼ of NW¼ and SE¼ of NW¼ of Section 10, Township 23 North, Range 8 West.

78. Lease of J. M. Hunt to J. E. Smitherman, dated February 19, 1919, recorded on March 8, 1919, in Book 10, page 263 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

N½ of NW¼; SW¼ of NW¼ of Section 4, Township 23 North, Range 8 West.

79. Lease of J. B. & J. H. Garrett to J. E. Smitherman, dated March 7th, 1919, recorded on the 13th day of March, 1919, in Book 10, page 509 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

211 35 acres off of the West side of NW¼ of SE¼ of Section 8, Township 23 North, Range 8 West.

80. Lease of Sidney T. Hunt to J. E. Smitherman, dated March 8, 1919, recorded on March 13, 1919, in Book 10, page 511 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

W½ of SW¼ and SW¼ of NW¼ of Section 8, W½ of E½ of NE¼ and W½ of NE¼ and E½ of NW¼ of Section 16, Township 23 North, Range 8 West.

81. v-Lease of T. G. Seegers to J. E. Smitherman, dated March 3, 1919, recorded on the 8th day of March, 1919, in Book 10, page 321 of the Conveyance Records of Claiborne Parish, Louisiana, covering and affecting the,

W½ of SE¼ of NE¼ and E½ of SW¼ of NE¼ less 5 acres off of the North end thereof; West ½ of NE¼ of SE¼ and NW¼ of SE¼ of Section 10, Township 23 North, Range 8 West.

82. Lease of H. P. Camp to J. E. Smitherman, dated February 14, 1919, recorded on March 8, 1919, Book 10, page 225 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

SW¼ of SE¼; S½ of SE¼ of SE¼ and 4 acres off of the South side of N½ of SE¼ of SE¼ of

Section 10; W½ of NE¼ and NE¼ of NE¼ of Section 15, Township 23 North, Range 8 West.

83. Lease of J. A. Seegers to J. E. Smitherman, dated March 3, 1919, recorded on the 8th day of March, 1919, in Book 10, page 319 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NW¼ of NE¼ and NE¼ of NW¼ less 5 acres in the Northwest corner thereof and SE¼ of NW¼ of Section 11, Township 23 North, Range 8 West.

84. Lease of Silas Taylor, Sr., to J. E. Smitherman, dated March 3, 1919, recorded on March 8th, 1919, in Book 10, page 355 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

S½ of SE¼ of Section 11, SW¼ of NE¼ of Section 14, Township 23 North, Range 8 West.

85. Lease of John T. Waller to J. E. Smitherman, dater February 28, 1919, recorded March 8th, 1919, Book 10, page 373 of the Conveyance Records
212 of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of NE¼ and NE¼ of SE¼ of Sec. 11 lying East of old Military road and that part of W½ of NW¼ of Sec. 12 lying West of the L. & N. W. right of way and a portion of said SW¼ of NW¼ lying East of said L. & N. W. right of way, belonging to John T. Waller as per declaration and correction of his lease; Township 23 North, Range 8 West; also 2½ acres out of the Southwest corner of NW¼ of NW¼ lying West of L. & N. W. right of way.

86. Lease of L. R. Bond to J. E. Smitherman, dated February 24, 1919, recorded on 8th day of March, 1919, in Book 10, page 207 of Conveyance Records of Claiborne Parish, La., covering and effecting,

SE¼ of NW¼ Sec. 12 and all that part of W½ of NW¼ of Section 12 lying East of L. & N. W. Railroad, Township 23 North, Range 8 West.

87. Lease of J. G. Slayton to J. E. Smitherman, dated February 15, 1919, recorded on 8th day of March, 1919, in Book 10, page 337 of the Conveyance Records of Claiborne Parish, La., covering and effecting,

NE¼ of NW¼ & W½ of W½ of NE¼ of Section 12, Township 23 North, Range 8 West.

88. Lease of R. E. Crump to J. E. Smitherman, dated February 15, 1919, recorded March 8, 1919, in Book 10, page 231 of the Conveyance Records of Claiborne Parish, Louisiana, covering and affecting,

W½ of SE¼ of Section 12, E½ of NE¼ of Section 13; & 2 acres in the Southwest corner of SE¼ of SE¼ of Section 12, Township 23 North, Range 8 West and SW¼ of NW¼ of Section 18, Township 23 North, Range 7 West & 3 acres in the Northeast corner of the NE¼ of SE¼ of Section 13, Township 23 North, Range 8 West, particularly described as being 1 acre wide from North to South by 3 acres long from East to West.

89. Lease of J. A. Yates to J. E. Smitherman, dated February 13, 1919, recorded on March 8th, 1919, in Book 10, page 395 of the Conveyance Records of Claiborne Parish, Louisiana, covering and affecting,

E½ of SE¼ of Section 12, less 2 acres out of the Southwest corner thereof; Township 23 North, Range 8 West; NW¼ of NW¼ of Section 18, Township 23 North, Range 7 West; also beginning at the Northeast corner of Section 13, Township 23 North, Range 8 West, and run West along Section line 140 yards, thence South 70 yards, thence East
213 140 yards to section line, thence North to place of beginning.

90. Lease of O. L. Traylor to J. E. Smitherman, dated February 20, 1919, and recorded on the 13th day of March, 1919, in Conveyance Book 10, page 519 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

W½ of NE¼ of Section 13, Township 23 North, Range 8 West.

91. Lease of F. M. Taylor to J. E. Smitherman, dated February 20, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 361 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NW¼ of Section 13, Township 23 North, Range 8 West.

92. Lease of Mrs. Annie Taylor, et al. to J. E. Smitherman, dated March 3rd, 1919, and recorded on the 8th day of March, 1919, in Conveyance Book 10, page 357 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and affects,

N½ of NE¼ of Section 14; SE¼ of NE¼ of Section 15; E½ of NE¼ of SE¼ of Section 15, all in Township 23 North, Range 8 West.

The last named twenty acres being dated on the 12th day of April, 1921, and recorded on the 16th day of April, 1921, in Conveyance Records of Claiborne Parish, Louisiana, and being a supplement to the least first described.

93. Lease of T. W. Sherman to J. E. Smitherman, dated February 15th, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 333 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NW¼ of Section 15; E½ of E½ of NE¼ of Section 16, Township 23 North, Range 8 West.

94. Lease of J. P. Lowe to J. E. Smitherman, dated March 18, 1919, and recorded on the 22nd day of March, 1919, in Book 12, page 163 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

214 NE¼ of NE¼; N½ of SE¼ of NE¼, Section 17, Township 23 North, Range 8, West, less that part of said property lying north of the public road, and about one and one-third acres now owned by Smead Winn in north west corner of NE¼ of NE¼ of Section 17.

95. Lease of Lannie Lowe to J. E. Smitherman, dated March 18th, 1919, and recorded on the 22nd day of March 1919, in Book 12, page 159 of the Conveyance Records of Claiborne Parish, Louisiana, covering,

S½ of SE¼ of NE¼ of Section 17, Township 23 North, Range 8 West.

96. Lease of Jim H. Goodwin to J. E. Smitherman, dated March 31st, 1919, recorded on the 5th day

of April 1919, in Book 12, page 351 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of SE¼ of Section 16, Township 23 North, Range 8 West.

97. Lease of Guy W. Taylor to J. E. Smitherman, dated March 3rd, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 353 of the Conveyance Records of the Parish of Claiborne, Louisiana, insofar as same covers and effects,

SE¼ of Section 15 less E½ of NE¼ of SE¼ of said Section 15, Township 23 North, Range 8 West.

98. Lease of S. L. Beene et al. to J. E. Smitherman, dated February 21st, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 201 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SE¼ of Section 13, Township 23 north, Range 8 West, less three acres north east corner thereof, owned by R. E. Crump, and particularly described as being one acre wide from north to south and three acres long from east to west.

99. Lease of W. F. Bond to J. E. Smitherman, dated March 18, 1919, and recorded on the 22nd day of March, 1919, in Book 12, page 155, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

215 NW¼ of NE¼ of Section 21; W½ of E½ of NW¼ of Section 22, Township 23 North, Range 8 West.

100. Lease of Robert P. Bond to J. E. Smitherman, dated February 14, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 203 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

E½ of NE¼; SW¼ of NE¼; W½ of SE¼ of Section 21, Township 23 North, Range 8 West.

101. Lease of Mrs. Anna Williamson to J. E. Smitherman, dated March 31st, 1919, and recorded on the 7th day of April, 1919, in Book 12, page 379 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

E½ of SE¼ of Section 21, Township 23 North, Range 8 West.

102. Lease of J. L. Bond to J. E. Smitherman, dated February 15th, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 205 of the Conveyance Records of Clabiorne Parish, Louisiana. covering and effecting,

W½ of NW¼, of Section 22, Township 23 North. Range 8 West.

103. Lease of Claude Beene, to J. E. Smitherman, dated March 18th, 1919, and recorded on the 22nd day of March, 1919, in Book 12, page 157 of the Conveyance Records of Claiborne Parish, Louisiana, covering,

E½ of E½ of NW¼; W½ of NE¼ of Section 22, Twp. 23 North, Range 8 West.

104. Lease of G. A. Hilburn to J. E. Smitherman, dated April 14th, 1919, and recorded on the 21st

day of April, 1919, in Book 12, page 477 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

S½ of NE¼ of NE¼; N½ of SE¼ of NE¼; and 6-2/3 acres off of west side of S½ of SE¼ of NE¼; and 13-1/3 acres off of west side of NE¼ of SE¼ of Section 22, Township 23 North, Range 8 West.

216 105. Lease of A. P. Milner to J. E. Smitherman, dated March 18, 1919, and recorded on the 22nd day of March, 1919, in Book 12, page 167 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

W½ of SE¼ of Section 22, and 1-1/2 acres off of West side of SE¼ of SE¼ of Section 22, Township 23 North, Range 8 West.

106. Lease of J. H. Hearne to J. E. Smitherman, dated March 5th, 1919, and recorded on the 22nd day of March, 1919, in Book 12, page 165, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

SE¼ of SE¼ less strip eighteen yards wide off West side thereof, and eighteen yards off of south side of NE¼ of SE¼ of Section 22, less one acre to Shady Grove Church yard, all in Township 23 North, Range 8 West.

107. Lease of S. R. Parker to J. E. Smitherman, dated February 19, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 299 of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

N½ of NE¼ of NE¼; S½ of SE¼ of NE¼ less 6-2/3 acres off west side thereof, and NE¼ of SE¼

less 13-1/3 acres off west side thereof, all in Section 22, Township 23 North, Range 8 West; and W½ of NW¼ of Section 23, Township 23 North, Range 8 West.

108. Lease of L. L. & G. H. Sherman to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 325 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SE¼ of NW¼; SW¼ of NE¼; N½ of NW¼ of SE¼ of Section 23, Township 23 North, Range 8 West.

109. Lease of J. R. Sherman to J. E. Smitherman, dated April 2, 1919, and recorded on the 9th day of April, 1919, in Book 12, page 401 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SE¼ of Section 23; and N½ of NW¼ of NE¼ of Section 26, Township 23 North, Range 8 West.

217 110. Lease of T. B. Lee to J. E. Smitherman, dated February 14, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 269 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of NE¼; S½ of NW¼ of NE¼ of Section 26, Township 23 North, Range 8 West.

111. Lease of D. M. Reeder to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 305, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting,

E½ of NW¼ of Section 26, Township 23 North, Range 8 West.

112. Lease of C. W. Sanders to J. E. Smitherman, dated February 14, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 317, of the Conveyance Records of Claiborne Parish, Louisiana, covering and effecting;

N½ of NW¼ of NW¼ of Section 26, Township 23 North, Range 8 West.

113. Lease of L. N. Winn to J. E. Smitherman, dated March 4th, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 389 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SW¼ of SW¼ of Section 27, Township 23 North, Range 8 West.

114. Lease of J. P. Mayfield to J. E. Smitherman, dated February 15, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 279 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

SE¼ of SE¼ of Section 28, Township 23 North, Range 8 West.

115. Lease of D. Frank Shaw to J. E. Smitherman, dated March 4, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 335, of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

218 SW¼ of SW¼ of Section 34, Township 23 North, Range 8 West, less five acres out

of south west corner thereof, and SW¼ of NW¼ of Section 36, Township 23 north, Range 8 West, less that portion thereof lying west of the Old Military Road.

116. Lease of W. G. Harkins to J. E. Smitherman, dated February 19, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 255 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects.

All that part of NW¼ of NW¼ of Section 1, Township 22 north, Range 8 West, lying west of fence running between land of W. G. Harkins and J. H. Taylor and not nowed by A. N. Brown; a tract of land described as follows:

Commencing at one-half mile stake between sections one and two, Township 22 north, Range 8 West; run east 30 chains and 32 links, thence north to where S. F. Browns and J. H. Taylor's land join, thence west on Brown, Taylor and Harkins' line 23 chains and 29 links to said section line of Section 1, thence south 23 chains and 29 links to starting point, containing seventy and one half acres, more or less; and S½ of NE¼ of Section 2 Township 22 north, Range 8 West. Also SE¼ of NW¼ of Section 10; and E½ of SW¼ of NW¼ of Section 10, all in Township 22, north, Range 8 west, being sixty acres, more or less. The last described sixty acres was reassigned to said Smitherman by the Sinclair Oil Co., all as will appear by reference to assignment duly of record in Conveyance Records of Claiborne Parish, Louisiana.

117. Lease of O. W. Dawson and W. Y. Dawson, Jr., to J. E. Smitherman, dated February 15th, 1919, and recorded on the 8th day of March, 1919, in

Book 10, page 235 of Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

NW¼ of NE¼, of Section 11, less 10 acres off North side thereof, Township 22 North, Range 8 West.

118. Lease of Henry Rowe to J. E. Smitherman, dated February 21, 1919, and recorded on the 8th day of Mch., 1919, in Book 10, page 311 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

219 That part of N½ of NE¼ of Section 14 lying east of Haynesville and Blankburn road, less about twenty four acres thereof, now owned by Loy L. Beene, Township 22 North, Range 8 West.

119. Lease of William C. Melton to J. E. Smitherman, dated February 21st, 1919, and recorded on the 8th day of March, 1919, in Book 10, page 283 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

All that part of the SW¼ of SW¼, and all that part of NE¼ of SW¼ of Section 1, Township 22 North, Range 8 West, lying north and west of Dixie Bayou. Also tract of land commencing on the south bank of said Dixie Bayou where same is crossed by the Old Military Road, run in north east course along with south bank eight chains and seventy links to corner marked by two twin pines, thence north seventy three yards, thence a little north of west fourteen chains and twenty two links to iron stake in field marking corner between this lessor and Hardaway, thence north one chain and fifty links to fence between this lessor and T. E. Almond, thence west along said fence twenty one chains and fifty six links to corner, thence south

eighteen chains and fifty links to one-half mile line, thence east along one-half mile line to south bank of Dixie Bayou and thence north east along Dixie Bayou to starting point, all in said Section 1, Township 22 north, Range 8 West.

120. Lease of S. C. Waller to J. E. Smitherman, dated March 6, 1919, recorded on the 8th day of March, 1919, in Book 10, page 377 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as same covers and effects,

That portion of NW¼ of NE¼ of Section 14, lying West of the Haynesville and Blackburn road, Section 14, Township 22 North, Range 8 West.

121. Lease of J. T. Smith to J. E. Smitherman, dated April 1, 1919, recorded on the 7th day of April, 1919, in Book 12, page 381 of the Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

10 acres out of the Northwest corner of the Northwest quarter of Section Four, Township 23 North, Range Eight West.

220 122. Lease of J. H. Garrett et al. to J. E. Smitherman, dated March 20, 1919, recorded April 9, 1919, in Book 12, page 403 of Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

The East half of the Northeast quarter, and Northwest quarter of Northeast quarter of Section 23, and the Northwest quarter of Northwest quarter, and the East half of Northwest quarter of Section 24, all in Township 23 North, Range 8 West.

123. Lease of J. L. Garrett to J. E. Smitherman, dated February 18, 1919, recorded March 8, 1919, in Book 10, page 245 of Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

The West half of Southwest quarter of Northwest quarter, Section 24, Township 23 North, Range 8 West.

124. Lease of T. W. Sherman to J. E. Smitherman, dated April 5, 1919, recorded April 9th, 1919, in Book 12, page 399 of Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

The East Half of Southwest quarter of the Northwest quarter of Section 24, Township 23 North, Range 8 West.

125. Lease of H. P. Camp to J. E. Smitherman, dated February 14, 1919, recorded March 8, 1919, in Book 10, page 225, Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

The Northwest quarter of Northeast quarter of Section 24, Township 23 North, Range 8 West.

126. Lease of H. P. Camp to J. E. Smitherman, dated April 3, 1919, recorded on April 9, 1919, in Book 12, page 297, Conveyance Records of Claiborne Parish, Louisiana, covering,

The Southwest quarter of the Northeast quarter of Section 24, Township 23 North, Range 8 West, less any part of said forty that may have previously been sold to Haynesville Lumber Company.

127. Lease of S. L. and L. L. Beene to J. E. Smitherman, dated February 21, 1919, recorded March 8, 1919, in Book 10, page 201, Conveyance
221 Records of Claiborne Parish, Louisiana, insofar as it covers and effects,

The Northeast quarter of Northeast quarter Section 24, Township 23 North, Range 8 West.

128. Lease of W. P. Sale to J. E. Smitherman, dated February 17, 1919, recorded 8th day of March, 1919, Book 10, page 315, Conveyance Records of Claiborne Parish, Louisiana, insofar as the same covers and effects,

Southeast quarter of Southeast quarter of Section 25, Township 23 North, Range 8, West, less about five acres thereof sold to T. S. Sale.

222 Also all other oil, gas and mineral leases at present owned by Assignor and situated in Township 22 North, Ranges seven and eight West, and in Township 23 North, Ranges six, seven and eight West, whether covered by the above description or not, except that portion of Mrs. Annie Taylor et al, lease situated in Section 14, Township 23 North, Range 8 West, covered by particular assignment this day made by Assignor to this Assignee, and except half interest in leases owned by assignor in conjunction with the Gilliland Oil Company. Assignor declared that he does by these presents sell, assign, and set over unto the said The Ohio Oil Company all of his rights of reverture, redemption and forfeiture, contained as part of the stipulation in Acts of Assignment executed by him in conjunction with the Roxanna Petroleum Co., in assignments of leases to Walter Keeble, Newton P. Jackson, E. F. Sims and others, all as will appear by reference to said Acts of Assignment duly of record in Claiborne Parish, Louisiana.

Assignor further declares that he does by these presents sell, assign, and set over unto the said Assignee one-half of the water rights purchased and acquired by him from S. T. Hunt on property owned by said Hunt and situated in Sections nine and sixteen, Township 23 North, Range 8 West, together with the right of ingress and egress on and under the said property for the purpose of taking and removing said water all as per act duly of record in the Conveyance Records of Claiborne Parish, Louisiana.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns forever, subject to the performance of the obligations, terms and stipulations contained in said above described mineral leases, and subject to the payment to Lessors of the rents and royalties stipulated in said mineral leases.

This sale and assignment is made for and in consideration of the sum and price of Three hundred and seventy thousand Dollars ($370,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the further obligation of The Ohio Oil Company, its successors and assigns, to pay over and deliver unto the said Assignor, his heirs, executors or assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described leased premises as an excess royalty, whether under the present lease contracts herein assigned, or under any extensions, renewals or other contractual obligations or covenants entered into by and between said The Ohio Oil Company, its successors or assigns with the present Lessors, their heirs and assigns.

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It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the

premises herein assigned, that said Smitherman, his heirs or assigns, shall share in the profits derived from the manufacture of said product to the extent of an undivided one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and paying a like proportion of the expenses of manufacturing same.

In witness whereof, the said James E. Smitherman and the said The Ohio Oil Company, acting through its above named officer, have hereunto signed their names in the presence of me, said Notary, and Mrs. R. T. Layne and E. G. Palmer, two competent witnesses at my office in the City of Shreveport, Caddo Parish, Louisiana, on this 23rd day of April, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL COMPANY,
By O. D. DONNELL,
Vice-President.

Witnesses:
MRS. R. T. LAYNE,
E. G. PALMER,
SAM W. MASON,
(Seal) Notary Public.

224 United States of America,

State of Louisiana, Second Judicial District Court, for the Parish of Claiborne.

I, Fred F. Meadows, Clerk of the Second Judicial District Court and Ex-Officio Recorder for the Parish of Claiborne, State of Louisiana, do hereby certify that the attached and foregoing photostatic picture

and copy is a true, complete and exact copy of act of assignment between James E. Smitherman and The Ohio Oil Company, dated April 23, 1921, and filed for record on April 25, 1921, as original No. 18,363, of the Conveyance Records of Claiborne Parish, Louisiana.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Homer, in said State, on this the 15th day of November, 1928.

FRED F. MEADOWS,
Clerk of Court and Ex-Officio Recorder, Claiborne Parish, Louisiana.

I, John S. Richardson, presiding Judge of the second Judicial District Court in and for the Parish of Claiborne, do hereby certify that Fred F. Meadows is the Clerk of Court, and Ex-Officio Recorder for the Parish of Claiborne, State of Louisiana; that same is a Court of record, having probate jurisdiction, and that the signature of "Fred F. Meadows", Clerk of Court and Ex-Officio Recorder, Claiborne Parish, Louisiana, to the foregoing certificate, is in the proper handwriting of him, the said Fred F. Meadows, Clerk of Court and Ex-Officio Recorder; to his official acts as such faith and credit are due and owing; and I do certify further that his attestation is in due form of law.

Given under my hand at Homer, Louisiana, on the 15th day of November, 1928.

JOHN S. RICHARDSON,
Judge.

225 I, Fred F. Meadows, Clerk of the Second Judicial District Court in and for the Parish of Claiborne, State of Louisiana, do hereby certify

that John S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial Court for the Parish of Claiborne, duly elected, commissioned and qualified as such and that said attestation is in due form of law.

Witness my hand and seal of said Court at Homer, Louisiana, on this the 15th day of November, 1928.

FRED F. MEADOWS,
(Seal) Clerk of Court.

Filed May 26, 1930.

226 EXHIBIT "X"

(Includes Exhibit "W".)

To the Honorable J. E. Reynolds, Judge of the Third Judicial Court of Louisiana, in and for the Parish of Claiborne:

The petition of George O. Baird, a resident of the Parish of Caddo, with respect represents:

I.

That he is now, and was on the 10th day of December, 1919, the owner of a valid oil and gas lease covering and affecting the South half of Northeast quarter (S½ of NE¼) of Section Twenty-four (24), Township Twenty-one (21) North, Range Eight (8) West, less thirty (30) acres off the west end thereof, subject to a drilling contract with Robert Lynn relative to a tract 280 feet square out of the Southwest corner thereof, together with the wells, tanks and all other equipment forming part of the said lease as a producing property.

II.

That on the 10th day of December, 1919, he entered into a contract with one J. Rogers Flannery, a resident of Pittsburgh, Pennsylvania, which said contract is hereto annexed and made part hereof, wherein and whereby petitioner agreed to sell the said property on certain conditions therein set out to the said Flannery.

III.

That the price of the sale, the executory contract affecting which is embraced in the said agreement made part hereof, was Two Million, Five Hundred Thousand Dollars ($2,500,000.00), which the said Flannery bound and obligated himself to pay on the terms and in the manner as here set out, to-wit:

(a) With the signing of the act, Flannery paid to your petitioner the sum of Five Hundred Thousand Dollars ($500,000.00), and bound himself to pay to your petitioner on or before the 8th day of February, 1920, the further sum of Three Hundred Thousand Dollars ($300,000.00).

The said Flannery further agreed in said contract that upon his failure to make the said additional payment of Three Hundred Thousand Dollars
227 ($300,000.00), your petitioner should have the right, on giving him fifteen days' notice in writing of intention so to do, to declare the forfeiture of the contract and to retain the sum so paid as liquidated damages for the violation of the contract.

(b) Said Flannery agreed in said contract, after the payment of the said Eight Hundred Thousand

Dollars ((\$800,000.00), to execute his notes for the remainder of the purchase price, five of the said notes to be in the sum of Three Hundred Thousand Dollars (\$300,000.00) each and one note in the sum of Two Hundred Thousand Dollars (\$200,000.00), all in the manner as set out in paragraph 4 of the contract hereto annexed, with the proviso that Flannery should have the right at any time after January 1, 1920, to pay all of the said notes with interest to the date of payment, upon which payment or upon payment in full of all of the said notes at their maturity, Flannery was to become the owner of the property and a deed therefore to be delivered to him.

IV.

Petitioner shows that Flannery paid the sum of Five Hundred Thousand Dollars (\$500,000.00), as set out in paragraph 3 of the contract, but never paid the sum of Three Hundred Thousand Dollars (\$300,000.-00) which he obligated himself to pay on or before the 8th day of February, 1920, nor has Flannery ever paid unto your petitioner any further sum whatsoever.

V.

Petitioner shows that he has remained in charge of the property and has operated the same and has received large quantities of oil therefrom, which he has sold, the proceeds of which such sale he has credited to Flannery.

VI.

Petitioner shows that the failure of Flannery to pay the said sum of Three Hundred Thousand Dollars and his failure to pay the other notes has ac-

complished the resolutory condition of such
228 contract, and that petitioner is entitled to have the same resolved and set aside and treated as if it never existed.

VII.

Petitioner shows that such sums as have been realized from the proceeds of the sale of oil produced from the said property were never the property of Flannery, and that on the resolution of the contract Flannery is entitled to no credit therefor, as the same by the resolution of the said contract was due to your petitioner.

VIII.

Petitioner shows, as aforesaid, that Flannery has paid to him the sum of Five Hundred Thousand Dollars ($500,000.00) only, and further shows that out of the said sum of Five Hundred Thousnd Dollars ($500,-000.00) he has advanced to Flannery or paid for said Flannery's personal account the sum of Three Hundred Eighty-five Thousand, One Hundred Twenty-five and 78/100 Dollars ($385,125.78), as will be fully shown on the trial hereof, making a total paid him by Flannery in cash for the said property of One Hundred Fourteen Thousand, Eight Hundred Seventy-four and 22/100 Dollars ($114,874.22)

IX.

Petitioner shows that he herewith tenders to said Flannery and offers to pay into the registry of the Court the said sum of One Hundred Fourteen Thousand, Eight Hundred Seventy-four and 22/100 Dollars ($114,874.22), or any further sum that might be found due on final liquidation by the Court, and also tenders to Flannery the notes of the said Flannery

now held by petitioner, and that he is entitled to and does hereby demand the resolution of the said contract.

X.

Petitioner shows that he has made repeated amicable demands on the said Flannery for the payment of the sums due him on account of the said contract, and, as will be shown on the trial hereof, has on numerous occasions made written demands
229 therefor, and that during the month of December, 1920, made such demand in person, and also made demand for the resolution of the contract and the annulment thereof.

XI.

Petitioner shows that the said described property is located in Claiborne Parish, Louisiana, and that your petitioner is entitled to have the said contract annulled, resolved and set aside.

Wherefore, he prays that an attorney at law be appointed to represent the said absent defendant and that process be duly served on the said Flannery through the attorney so appointed, and that after all legal delays and due proceedings had there be judgment resolving and setting aside the aforesaid contract, hereto annexed as part hereof, and that the said judgment carry with it the legal effect of a judgment of resolution, that is to say, treating said contract as if it never existed and declaring petitioner to have always been the owner of said property, and canceling and annulling all indebtedness of said Flannery, including the notes aforesaid, and ordering the said Flannery to accept the amount due by your petitioner to the said Flannery, to-wit: One Hundred Fourteen Thousand, Eight Hundred Seventy-four and 22/100 Dollars ($114,874.22).

Petitioner further prays for all necessary orders and general relief.

(Signed) THIGPEN & HEROLD,
Attorneys for Petitioner.

State of Louisiana,
Parish of Caddo.

George O. Baird, being by me first duly sworn, deposes and says, that he is petitioner in the above and foregoing petition, and that all of the facts and allegations therein contained are true and correct, and that Hon. J. E. Reynolds, Judge is absent from the Parish of Claiborne.

(Signed) GEO. O. BAIRD.

Sworn to and subscribed before me on this 11th day of January, 1921.

(Signed) J. A. THIGPEH,
Notary Public.

230 ORDER.

Let J. D. Wilkinson, an attorney at law, be appointed to represent the absent defendant, J. Rogers Flannery, and let service and citation be made upon him according to law.

Homer, La., January 12, 1921.

(Signed) L. E. KILPATRICK,
Chief Deputy Clerk of the Third Judicial District.

(Indorsements): No. 5201—Third Judicial District Court, Parish of Claiborne. George O. Baird v. J. Rogers Flannery. Petition. Filed Jan. 12, 1921.

(Signed) S. R. Newsom, Dy. Clerk, D. C. Duly recorded on page 254, Book "N", Dist. Court, Records, Claiborne Parish, La., on 3 day of Jan., 1921. (Sgd.) L. E. Kilpatrick, Dy. C. D. C.

United States of America,

State of Louisiana,
Parish of Claiborne.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, State of Louisiana, do hereby certify; That the above is a true, correct and complete copy of the original petition in suit No. 5201, Geo. O. Baird vs. J. Rogers Flannery, on the docket of said Court, and found recorded on page 354, Book "N", District Court Records, Claiborne Parish, Louisiana.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at the City of Homer, on this the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

(Seal)

F. F. MEADOWS,
Clerk 2nd Judicial District Court, in and for Claiborne Parish, La.

231 I, Jno. S. Richardson, presiding Judge of the 2nd Judicial District Court for the Parish of Claiborne, do hereby certify that F. F. Meadows is the Clerk of said Court, that the same is a Court of record, having probate jurisdiction, and that the signature F. F. Meadows, Clerk, to the foregoing certificate is in the proper handwriting of him, the said, F. F. Meadows, Clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord one thousand nine hundred and thirty.

JNO. S. RICHARDSON,
Judge.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, State of Louisiana, do hereby certify that Jno. S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court in and for Claiborne Parish, La., duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Given under my hand at the City of Homer, on the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
(Seal) Clerk.

232 In the Third Judicial District Court, Parish of Claiborne.

George O. Baird,
vs. No. 5201.
J. Roberts Flannery.

Now into Court comes J. Rogers Flannery, defendant herein, and for answer to plaintiff's petition, denies all and singular the allegations thereof, save such as may be hereafter specially admitted.

Further answering, respondent makes answer to the particular paragraphs of said petition as follows:

I.

The allegations of Paragraph I are denied.

II.

The allegations of Paragraph II are admitted.

III.

The allegations of Paragraph III are denied and the facts averred to be that defendant entered into a contract with plaintiff George O. Baird, reading as per copy of same attached hereto and made part hereof.

IV.

The allegations of Paragraph IV are denied and the facts averred to be that prior to the institution of this suit, defendant Flannery, paid to plaintiff, Baird, both the sum of $500,000.00 as set out in paragraph 3 of the contract, and also the sum of $300,000.00 described in the contract as payable on or before February 8, 1920, and that moreover defendant, Flannery, has paid to plaintiff, Baird, additional large sums, as will more fully be set out on the trial of this case.

V.

The allegations of Paragraph V are denied and the facts averred to be that defendant, Flannery, has been in charge of the said property and has operated the same through George O. Baird, who acted as defendant's manager and received a monthly salary from defendant for his services in so doing.

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VI.

The allegations of Paragraph VI are denied.

VII.

The allegations of Paragraph VII are denied.

VIII.

The allegations of Paragraph VIII are denied, save the allegation that Flannery paid the sum of $500,-000.00 to plaintiff, Baird, which allegation is admitted.

IX.

The allegations of Paragraph IX are denied.

X.

The allegations of Paragraph X are denied.

XI.

This allegation is admitted in so far as it locates the property in Claiborne Parish, Louisiana, but is otherwise denied.

Wherefore, respondent prays that plaintiff's suit may be dismissed and that respondent may be quieted in his title to the property; and for costs and general relief.

(Signed) HALL, MONROE & LEMAN,
Attorneys for respondent.

J. Blanc Monroe, being duly sworn, deposes and says:

That he is a member of the firm of Hall, Monroe & Leman, attorneys for defendant herein; that the defendant is absent from the State of Louisiana; that he has read the foregoing answer and that the facts and allegations therein contained are true and correct to the best of his knowledge, information and belief.

(Signed) J. BLANC MONROE.

Sworn to and subscribed before me this 8 day of March, 1921.

(Signed) WATTS K. LEVERICK,
Notary Public.

234 EXHIBIT "W".

Copy.

This agreement, made and executed this 10th day of December, A. D. 1919, by and between George O. Baird, a resident of Caddo Parish, Louisiana, and J. Rogers Flannery, of Pittsburgh, Pennsylvania, Witnesseth:

1. The said Baird has agreed to sell with full warranty of title, and the said Flannery has agreed to buy, on the terms, conditions and consideration hereinafter set out, the following described property situated in the Parish of Claiborne, State of Louisiana, to-wit:

The oil, gas and mineral lease now held and owned by the said George O. Baird, covering the South half of the Northeast quarter (S½ of NE¼) of Section Twenty four (24), Township Twenty-one (21) North, Range Eight (8) West, less 30 acres of the West end thereof, and subject to a drilling contract with Robert Lynn relative to a tract 280 feet square out of the Southwest corner thereof; together with the wells, tanks and all other equipment forming part of the said lease as a producing property.

2. The price of the said sale is the sum of Two Million Five Hundred Thousand ($2,500,000.00) Dollars, which the said Flannery binds and obligates himself to pay in the manner and on the terms here set out, to-wit:

3. With the signing of this act the said Flannery has paid to the said Baird the sum of Five Hundred Thousand Dollars ($500,000.00), the receipt whereof is hereby acknowledged, and further binds and obligates himself to pay on or before the eighth day of February, 1920, to the said Baird the further sum of Three Hundred Thousand Dollars ($300,000.00).

Upon the failure of the said Falnnery [Flannery] to make the said payment on or before the date above specified, the said Baird shall have the right and option, after giving to the said Flannery fifteen days' notice in writing of his intention so to do, to declare the forfeiture of this contract and to retain the sums already paid, and any retention of said sums shall be in full liquidation and settlement of damages and in lieu of any other or further damages whatsoever which the said Baird, his heirs or assigns, might claim, and operate as a release and discharge of said Flannery, his heirs and assigns, of any from any and all liability whatsoever incurred under or by virtue hereof.

235 4. When the said Flannery shall have paid to the said Baird under the aforesaid terms the sum of Eight Hundred Thousand Dollars ($800,000.00), then the said Baird shall execute to the said Flannery a good and sufficient deed to the property herein sold, taking the notes of the said Flannery for the remainder of the purchase price, five (5) of the said notes to be in the sum of Three Hundred Thousand Dollars ($300,000.00) each, due on or before thirty (30), sixty (60), ninety (90), one hundred twenty (120) and one hundred fifty (150) days, respectively, after date of said deed, and one (1) note for the sum of Two Hundred Thousand Dollars ($200,000.00), due on or before one hundred eighty (180) days after date of execution of the said deed, said notes bearing five (5) per centum per annum interest from date; said notes to be secured by said property and the production thereof, subject, however, to a provision that, so long as the said notes are being promptly paid at maturity, no part of production from said wells shall be withheld from the purchaser on account of the said security. Said notes also to be subject to the right of payment before maturity, with interest to date of payment, as hereinafter provided.

5. At any time after January 1, 1920, the said Flannery shall have the right to make payment of the entire unpaid balance of the said purchase price, with such interest only as may have accrued to such date of payment, and contemporaneously with such payment to receive from the said Baird, and the said Baird shall deliver, a good and sufficient deed for the property herein sold, or, if said deed has already been delivered under the provisions of the preceding paragraph, then the said Baird shall forthwith deliver and return to the said Flannery any and all promissory notes given under the said preceding paragraph for any part of the said purchase price.

6. Upon payment of the said sum of Eight Hundred Thousand Dollars ($800,000.00) and the execution of the deed and notes as aforesaid, as provided in paragraph 4, or upon payment of the entire unpaid balance of the said purchase price as provided in paragraph 5, the said Flannery shall be entitled to credit for the proceeds of all the oil run and sold from the property from and after 7:00 A. M., November 8, 1919, and shall pay to the said Baird all sums expended by him for or on account of the development of the said properties from and after said date.

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7. The said Flannery takes notice of the fact that there is an adverse claim asserted against an undivided one half interest in the said lease by the Atlas Oil Company, which claim is now in process of litigation in the District Court of Caddo Parish, Louisiana, and agrees and binds himself to pay the entire purchase price, as herein provided, notwithstanding the said claim and litigation, and in consideration thereof the said Baird binds and obligates himself, after the payment by the said Flannery of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) and be-

fore or contemporaneously with the payment by the said Flannery of the respective installments of the remainder of the purchase price, to secure, indemnify and save harmless the said Flannery against the result of the said suit either by execution of a bond, with surety satisfactory to the said Flannery, or by the deposit of money in escrow in the American National Bank of Shreveport in an amount satisfactory to the said Falnnery, [Flannery], or by the deposit in said Bank of securities of a kind and in an amount satisfactory to the said Flannery, (at the option of the said Baird) it being understood and agreed that the entire purchase price is to be paid regardless of the said litigation, the said Baird, however, to indemnify, save harmless and make whole the said Flannery with respect to the last half of the purchase price against the loss of any interest in the said property by reason of the said litigation.

8. It is agreed and understood that there is a commission of five (5) per cent, or One Hundred Twenty-five Thousand Dollars ($125,000.00), to be paid to the broker responsible for the negotiation of this sale, and, in order to protect the said Flannery, the said Baird agrees that out of each payment made
237 by the said Flannery, until one-half of the total purchase price has been paid, he will pay to the broker five (5) per cent thereof, and out of further payments will retain in escrow for the account of the said broker five (5) per cent thereof, the same to be held to await the final determination of the litigation above referred to, it being understood that broker's commission of five (5) per cent on half of said purchase price is contingent on final payment of the same, and on Baird's lease to said property being held to be good.

9. If at any time prior to the payment of the said sum of Eight Hundred Thousand Dollars ($800,000.-

00) the said Flannery should, without any payment at that time, desire the said Baird to execute a deed, then Barid [Baird] agrees and obligates himself to do so, depositing the said deed in escrow in the American National Bank of Shreveport, with instructions to the said Bank to deliver the said deed to the said Flannery upon his full compliance with all the conditions, stipulations and obligations hereinabove provided, that is to say, upon the completion of the payment of the said sum of Eight Hundred Thousand Dollars ($800,000.00) within the time hereinabove stipulated and upon his execution of the notes as aforesaid, secured as above provided.

10. This Agreement to bind the heirs, executors, administrators and assigns of the respective parties hereto.

Executed at Pittsburgh, Pennsylvania, on this the 10th day of December, A. D. 1919.

..... (Seal)

..... (Seal)

Attest:

.....

.....

(Written across back of copy): Filed in evidence Plff. 11/9/21. (Signed) Neville Ward, Dy. C. D. C.

238 (Indorsements): No. 5201. In the Third Judicial District Court, Parish of Claiborne. George O. Baird vs. J. Roberts Flannery. Answer. Filed Mch. 10, 1921. (Signed) F. F. Meadows, Clerk, D. C. Duly recorded on page 66 Book O Dist. Court Records, Claiborne Parish, La., on 22 day of June, 1921. (Signed) S. R. Newsom, Dy. C. D. C.

United States of America.

State of Louisiana,
Parish of Claiborne.

I, F. F. Meadows, Clerk of the Second Judicial District Court in and for the Parish of Claiborne, do hereby certify; that the above is a true, correct and complete copy of the original answer, with copy of contract attached thereto, in suit No. 5201, Geo. O. Baird vs. J. Roberts Flannery on file in my office, answer being recorded in Dist. Court Record O, page 66.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at the City of Homer, on this the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
Clerk Second Judicial District Court, Claiborne Parish, La.

I, Jno. S. Richardson, presiding Judge of the Second Judicial District Court for the Parish of Claiborne, do hereby certify that F. F. Meadows is the Clerk of said Court, that the same is a Court of record, having probate jurisdiction, and that the signature, F. F. Meadows, Clerk, to the foregoing certificate
239 is in the proper handwriting of him, the said, F. F. Meadows, Clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirty.

JNO. S. RICHARDSON,
Judge.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, do hereby certify that Jno S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court in and for Claiborne Parish, duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
(Seal) Clerk.

240 Third Judicial District Court, Claiborne Parish, Louisiana.

George O. Baird,
vs. No. 5201.
J. Rogers Flannery.

On joint motion of J. Rogers Flannery, the original defendant herein, and John Munhall, Jr., assignee and transferee of the said J. Rogers Flannery, and on suggesting to this Honorable Court that the said J. Rogers Flannery has transferred, assigned, set over and delivered for a valuable consideration unto the said John Munhall, Jr., all of his right, title and interest of any character whatsoever owned by him or due to him under that certain contract entered into between the said J. Rogers Flannery and the said George O. Baird on the 10th day of December, 1919, relative to a sale of oil and gas lease covering and effecting

The South half of the Northeast quarter (S½ of the NE¼) of Section Twenty-four (24), Township Twenty-one (21) North, Range Eight (8) West, less 30 acres off of the West end thereof, subject to a drilling contract with Robert Lynn relative to a tract 280 feet square out of the Southwest corner thereof, together with the wells, tank, vacuum system and all other equipment, appurtenances of every nature and kind, including claims and open accounts, forming part of said lease as an operating property.

and has given notice to the said Baird accordingly; and on further suggesting that under the circumstances it is proper that the said John Munhall, Jr., should be made defendant herein; and on further suggesting that the said John Munhall, Jr., desires to adopt the answer heretofore made herein by the said J. Rogers Flannery.

It is ordered that the said John Munhall, Jr., be made defendant herein, and that the answer heretofore filed on behalf of the said J. Rogers Flannery be, and the same is ordered to stand as the answer of the said John Munhall, Jr.

(Signed) J. E. ROYNOLDS, Judge.
J. ROGERS FLANNERY,
JOHN MUNHALL, JR.,
(Sgd.) By HALL, MONROE & LEMAN,
Attys.

(Indorsements): No. 5201. 3d Judicial Dist. Ct. Claiborne Parish. Geo. O. Baird vs. J. Rogers Flannery. Motion. Filed Nov. 9, 1921. (Sgd.) Neville Ward, Dy. C. D. C. Duly recorded on page 559 Book O Dist. Court Records, Claiborne Parish, La., on 19th day of Jan., 1922. (Sgd.) L. E. Kilpatrick, Dy. C. D. C.

241 United States of America,

State of Louisiana,
Parish of Claiborne.

I, F. F. Meadows, Clerk of the Second Judicial District Court in and for the Parish of Claiborne, do hereby certify: That the above is a true, correct and complete copy of the original motion in suit No. 5201, Geo. O. Baird vs. J. Rogers Flannery on file in my office, same being recorded in Dist. Court Record O, page 559.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at the City of Homer, on this the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
(Seal) Clerk Second Judicial District Court, Claiborne Parish, La.

I, Jno. S. Richardson, presiding Judge of the Second Judicial District Court for the Parish of Claiborne, do hereby certify that F. F. Meadows is the Clerk of said Court, that the same is a Court of record, having probate jurisdiction, and that the signature, F. F. Meadows, Clerk, to the foregoing certificate is in the proper handwriting of him, the said, F. F. Meadows, Clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirty.

JNO. S. RICHARDSON,
Judge.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, do hereby certify that Jno. S. Richardson, whose genuine signature appears to the foregoing Certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court in and for Claiborne Parish duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

242 Given, under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
(Seal) Clerk.

243 Third Judicial District Court, Claiborne Parish, Louisiana.

George O. Baird,

vs. No. 5201.

J. Rogers Flannery.

In this cause, by reason of the law and evidence being in favor thereof, it is ordered, adjudged and decreed:

1. That the contract of date December 10th, 1919, attached to plaintiff's petition, be, and the same is hereby resolved for non-compliance by defendant with the stipulations therein.

2. That, accordingly, plaintiff, George O. Baird, be and he is hereby declared to be the owner of the property described in said contract, to-wit:

"The oil, gas and mineral lease now held and owned by the said George O. Baird, covering the South half of the Northeast quarter (S½ of the NE¼) of Section Twenty-four (24), Township Twenty-one (21) North, Range Eight (8) West, less 30 acres off of the West end thereof, and subject to a drilling contract with Robert Lynn relative to a tract 280 feet square out of the Southwest corner thereof; together with the wells, tanks, and all other equipment forming part of the said lease as a productive property". Situated in the Parish of Claiborne, State of Louisiana, subject to the claim of John Munhall, Jr., substituted defendant or assigns, in the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, with interest from November 9, 1921.

3. That the resolution of the said contract hereby decreed is ordered and adjudged effective as of date of said contract, so that no right, title, claim or interest therein has ever vested in the said Flannery or his assigns.

4. That the plaintiff, George O. Baird, be and he is hereby ordered to pay unto John Munhall, Jr., the vendee of the said Flannery, and substituted defendant herein, the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, being the net sum heretofore paid by the said Flannery to the said Baird, under the said contract, and that this judgment shall become operative and in full force and effect
244 upon the restitution of the said sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, by its payment either to the said John Munhall, Jr., or his representatives; and that upon such payment of the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, the said contract shall be as if it had never existed.

It is further ordered, adjudged and decreed that defendant pay all costs.

Thus done, read and signed in open Court on this 9th day of November, 1921.

(Signed) J. E. REYNOLDS,
District Judge.

(Indorsements): No. 5201—George O. Baird versus J. Rogers Flannery. Judgment. Filed Nov. 9, 1921. (Sgd.) Neville Ward, Dy. C. D. C. Duly recorded on page 163, Book P, Dist. Court Records, Claiborne Parish, La., on 12th day of April, 1922. (Sgd.) Neville Ward, Dy. C. D. C. No. 23623. J. Rogers Flannery Judgment to Geo. O. Baird and Geo. O. Baird judgment to John Munhall, Jr. Filed for Record at 3/15 P. M. Dec. 7, 1921. (Signed) S. R. Newsom, Deputy Clerk, D. C. Duly recorded on page 309, Book 32, Conveyance Records, Claiborne Parish, La., 19 day of Jan., 1922. (Sgd.) L. E. Kilpatrick, Dy. C. D. C.

United States of America.

State of Louisiana,
Parish of Claiborne.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, State of Louisiana, do hereby certify; That the above is a true, correct and complete copy of the original Judgment in Suit No. 5201, Geo. O. Baird vs. J. Rogers Flannery, on the docket of said Court, and found recorded on page 163, Book P, District Court Records, Claiborne Parish, Louisiana.

245 In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at the City of Homer, on this the 15th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirty.

(Seal) F. F. MEADOWS,
Clerk 2nd Judicial District Court, Claiborne Parish, La.

I, Jno. S. Richardson, presiding Judge of the 2nd Judicial District Court for the Parish of Claiborne, do hereby certify that F. F. Meadows is the Clerk of said Court, that the same is a Court of record, having probate jurisdiction, and that the signature F. F. Meadows, Clerk, to the foregoing certificate is in the proper handwriting of him, the said F. F. Meadows, Clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord one thousand nine hundred and thirty.

JNO. S. RICHARDSON,
Judge.

I, F. F. Meadows, Clerk of the Second Judicial District Court, in and for the Parish of Claiborne, State of Louisiana, do hereby certify that Jno. S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court in and for Claiborne Parish, La., duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

Given under my hand at the City of Homer, on the 15th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty.

F. F. MEADOWS,
(Seal) Clerk.

Filed May 26, 1930, W. B. Lee, Clerk, U. S. District Court, Western District of La.

246 ~~EXHIBIT "Y".~~

State of Louisiana,
Parish of Caddo.

This agreement between George O. Baird, husband of Estella Mitchell, a resident of Caddo Parish, Louisiana; and the Gulf Refining Company of Louisiana, a corporation under the laws of the State of Louisiana, and domiciled at Orleans Parish, witnesseth:

1.

The said Baird is the owner of an oil and gas lease covering all of the S½ of the NE¼ of Section 24, Township 21 North, Range 8 West, less the West 30 acres thereof; and less also about one (1) acre in a square in the Southwest corner of the said described property, as to which one acre, however, the said Baird is the owner of an undivided one-half (½) interest, the Gulf Refining Company of Louisiana being the owner of the other undivided one-half interest in the lease covering the said one acre; the lease above referred to including the eleven (11) oil wells on the said property, all the equipment thereto annexed and attached, together with the interest of the said Baird in the one well located on the said one acre tract hereinabove referred to.

2.

For and in consideration of the obligations and agreements hereinafter set out, the Gulf Refining Company of Louisiana has obligated itself, and does hereby agree to take possession of the said lease, to equip same properly at its own expense, and to operate such wells diligently for the production of oil, and to maintain the said production as long as oil may be produced therefrom in paying quantities; all such equip-

ment and operation to be at the entire expense of the Gulf Refining Company of Louisiana and free from any expense whatsoever to the said Baird. And all taxes of every character legally assessed and charged against said lease, including all severance tax on the production therefrom except as to the royalty interests,
247 shall be paid by the Gulf Refining Company of Louisiana.

3.

For and in consideration of the obligation of the Gulf Refining Company of Louisiana to equip and to operate said property free of expense to him, the said George O. Baird agrees that the Gulf Refining Company of Louisiana may retain from the production of the said property, forty per cent (40%) of the oil produced therefrom, the agreement between the parties being that out of the said 40 per cent so retained by the Gulf Refining Company of Louisiana, that company shall deliver the royalty of one-eighth (1/8th) of the oil, as provided for in the lease covering said property, and shall in addition deliver to the said Baird for a term of three (3) years, beginning the 1st day of November, 1921, One-twenty-fourth (1/24th) of all of the oil that may be saved from that produced from the said property the said delivery to be made in the same manner in which the royalty oil is to be delivered to the lessors, under the provisions of the original lease.

4.

In consideration of this obligation and agreement, as hereinabove set out, the Gulf Refining Company of Louisiana shall have, however, the right to all of the gas, including casing-head gas, extracted from the wells on the said property, and all profits therefrom

accruing, subject to such contracts as it may be able to secure from the lessors of the said property, and free from any obligation to account to the said Baird for any of the said gas or any of the profits derived from its manufacture or sale.

5.

The Gulf Refining Company of Louisiana has this day loaned to the said George O. Baird, the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, on the sole security of the said lease, without any personal liability. And, in order to secure the repayment of the said sum within thirty (30) months from this date, the said Baird has, and does by these presents, mortgage and hypothecate unto the said Gulf Refining Company of Louisiana all of his
248 right, title and interest thereto, and, in addition, to further secure said obligation, pledges unto the said Gulf Refining Company of Louisiana all of the oil that may be saved from that produced from the said leased lands, after the delivery of the royalty of one-eighth (1/8th) to the lessors, and the one-twenty-fourth (1/24th) to the said Baird, as hereinabove provided.

It is distinctly agreed and understood, however, that the Gulf Refining Company of Louisiana will as hereinabove set out deliver to the said Baird sixty per (60%) of all the oil produced from the said property, notwithstanding the said mortgage and pledge, and free from any claim thereunder, until the said Baird shall have received from the said production sufficient oil to yield him, at the market price prevailing on the date of delivery, and at which price he will be able to sell said oil, the sum of Three Hundred and Twenty-five Thousand ($325,000.00) Dollars, from the 60 per cent (60%) of the oil produced from

the said property which the said Gulf Refining Company of Louisiana, has under this agreement obligated itself to deliver.

After the said Baird shall have received from the 60 per cent of the oil so delivered to him the sum of $325,000.00 or after the expiration of the 30 months from this date, if the said Baird shall not have received such amount from the said production within that time, then the Gulf Refining Company of Louisiana shall have the right to apply such 60 per cent of the oil, or the proceeds thereof, to the re-payment of the said loan until same shall have been paid in full, without interest.

6.

In consideration of the obligations and agreements hereinabove entered into on the part of the Gulf Refining Company of Louisiana, the said Baird now agrees and obligates himself that whenever there shall have been produced from the said property by the Gulf Refining Company of Louisiana such quantity of oil that the 60 per cent which the said Gulf Refining Company of Louisiana has agreed herein
249 to deliver to him, shall have produced the sum of Six Hundred and Seventy-five Thousand ($675,000.00) Dollars, (the first $325,000.00 of the proceeds of the sale of such oil to be retained by Baird as above provided, and the remaining $350,000.00 to be retained by the said Company, to be applied by it to the liquidation of the indebtedness above set out), that he will then sell, assign, convey and deliver to the said Gulf Refining Company of Louisiana the entirety of the said mineral lease hereinabove referred to and forming the subject matter of this contract, for the consideration of the obligation upon the part of the Gulf Refining Company of

Louisiana to continue to operate said property for the production of oil for such length of time as it may be able to produce oil therefrom in paying quantities, and to deliver to him, or his transferees, the one-twenty-fourth (1/24th) royalty out of the oil, as hereinabove provided, until the expiration of three (3) years from this date, and a royalty of one-thirty-second (1/32nd) of all the oil that may be saved from that produced, after said date, and as long thereafter as oil may be produced from the said property in paying quantities.

7.

As further security to the Gulf Refining Company of Louisiana for the performance of the obligation to sell as set out in the last preceding paragraph, the said Baird has this day executed an assignment in favor of the said Company of his entire interest in the said lease, which said assignment he agrees to deposit in escrow with such depositary as may be mutually agreed upon by the parties, to be retained by said trustee and to be delivered to the Gulf Refining Company of Louisiana, when it shall have complied with the obligations above set out and made a consideration of said assignment; said assignment so delivered in escrow shall moreover be considered between the parties thereto as a further security for the pledge and mortgage hereinabove stipulated.

250 In witness of which, this agreement has been this day executed in duplicate, the said Gulf Refining Company of Louisiana being represented therein by its Third Vice-President, C. R. Minor, being herein authorized, and this agreement being executed as of and effective from seven-thirty o'clock A. M., November 1, 1921.

Shreveport, La., Nov. 16th, 1921.

(Signed) GEO. O. BAIRD,
GULF REFINING COMPANY OF LOUISIANA,
(Signed) By C. R. MINOR,
Third Vice-President.

Attest:

(Signed) J. A. THIGPEN,
(Signed) E. A. BEACON.

Executed before me Notary Public, in and for Caddo Parish, La.

(Signed) F. W. SHROPSHIRE,
Notary Public.

Indorsements: No. 23524. Geo. O. Baird Agreement to Gulf Rfg. Co. of La. Filed for Record at 10 A. M. Dec. 3, 1921 (Signed) S. R. Newsom, Deputy Clerk, D. C. Duly recorded on page 274 Book 32 Conveyance Records, Claiborne Parish, La., on 17 day of Jany., 1922. (Signed) L. E. Kilpatrick, Dy. C. D. C. //

251 United States of America.

State of Louisiana,
Parish of Claiborne.

I, F. F. Meadows, Clerk of the Second Judicial District Court in and for Claiborne Parish, La., do hereby certify: That the above and foregoing copy is a true, correct and complete copy of the original agreement between Geo. O. Baird and Gulf Refining Co. of La. on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at the City of Homer, La., on this 15th day of May in the year of our Lord one thousand nine hundred and thirty.

F. F. MEADOWS,
(Seal) Clerk Second Judicial District Court, Claiborne Parish, La.

I, Jno. S. Richardson, presiding Judge of the Second Judicial District Court for the Parish of Claiborne, do hereby certfiy that F. F. Meadows is the Clerk of said Court, that the same is a Court of record, having probate jurisdiction, and that the signature, F. F. Meadows, Clerk, to the foregoing certificate is in the proper handwriting of him, the said F. F. Meadows, Clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the City of Homer, La., on the 15th day of May in the year of our Lord one thousand nine hundred and thirty.

JOHN S. RICHARDSON,
Judge.

252 I, F. F. Meadows, Clerk of the Second Judicial District Court in and for the Parish of Claiborne, do hereby certify that Jno. S. Richardson, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Second Judicial District Court for the Parish of Claiborne, duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

Given under my hand, at the City of Homer, on the 15th day of May, in the year of our Lord one thousand nine hundred and thirty.

F. F. MEADOWS,
(Seal) Clerk.

Filed May 26, 1930.

253 (Title Omitted.)

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true and considered a part of and included in the Record heretofore made at the trial of the above entitled action:

1. The net income received from the Gulf Refining Company on oil payments from the Langston lease, in accordance with the instrument of November 16, 1921, appearing as part of the record as Exhibit Y, and included in gross income from oil sales, is as follows:

Year.	Total.	George O. Baird Partnership.	Mrs. Thigpen Mrs. Herold.	Thigpen-Herold Baird-Palmer.
1921	$22,983.06	$11,491.53	$5,745.76	$5,745.77
1922	181,765.25	90,882.62	45,441.32	45,441.31

2. The total remaining undepleted costs of the Langston lease and the remaining costs of the depreciable property transferred to the Gulf Refining Company on November 16, 1921, was $96,114.90. If the payments received from the transfer of said lease are first applied to extinguish the cost of the property

transferred, an allocation of the costs to the years 1921 and 1922 and to the various partnership interests is reflected in the following table:

Year.	Total.	George O. Baird Partnership.	Mrs. Thigpen Mrs. Herold.	Thigpen-Herold Baird-Palmer.
1921	$22,983.06	$11,491.53	$5,745.76	$5,745.77
1922	73,131.84	22,011.68	11,005.84	40,114.31

3. The Commissioner of Internal Revenue in his final determination of the net income accruing from the transfer of the Langston lease to the Gulf Refining Company on November 16, 1921, as shown in Bureau letter of December 21, 1926, addressed to the
254 George O. Baird Partnership, said letter being in evidence as Exhibit F, applied and allocated said total costs of $96,114.90 as extinguishment of capital investment, against the payment of $350,000.00, then considered by the Commissioner of Internal Revenue to be part of the sale price of said Langston lease, increasing net income by $253,855.10.

4. On May 5, 1928, plaintiff filed claim for refund of Federal Income taxes for the calendar year 1921, in the amount of $166,219.26, copy of which is attached hereto and by reference made a part hereof as Exhibit X-1.

5. On June 20, 1929, plaintiff filed claim for refund of Federal income taxes for the calendar year 1921, in the amount of $166,219.26, copy of which is attached hereto and by reference made a part hereof as Exhibit Z-2.

6. On May 5, 1928, plaintiff filed claim for refund of Federal income taxes for the calendar year

1922, in the amount of $46,718.54, copy of which is attached hereto and by reference made a part hereof as Exhibit Z-3.

7. On June 20, 1929, plaintiff filed claim for refund of Federal income taxes for the calendar year 1922, in the amount of $46,718.54, copy of which is attached hereto and by reference made a part hereof as Exhibit Z-4.

FRED R. ANGEVINE,
Fred R. Angevine,
SMITHERMAN, TUCKER & MASON,
Smitherman, Tucker & Mason,
DART & DART,
Dart & Dart,
By JOHN H. TUCKER, JR.,
Attorneys for Plaintiff.
E. C. HANSON,
H. S. FESSENDEN,
PHILIP H. MECOM,
Attorneys for Defendant.

Filed June 19, 1931.

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255 STIPULATION IN RE FILING OF INCOME TAX RETURNS.

(Title Omitted.)

It is hereby stipulated betwen the parties to this suit and to the suits consolidated herewith for trial, as follows:

1. That timely income tax returns were filed by the partnerships known as J. E. Smitherman, Special

Account, and the George O. Baird Partnership, for the calendar years 1921 and 1922; that said partnership returns were filed on a cash receipts and disbursements basis; that the partnership returns were audited by the Commissioner of Internal Revenue, and as a result thereof the incomes of said partnerships were increased because of said audits, and the results were reflected in the individual incomes of all of the parties plaintiff in the above consolidated cases with respect to income from J. E Smitherman, Special Account, the income of the George O. Baird partnership being reflected only in the returns of E. G. Palmer, Mrs. E. G. Palmer and Mrs. J. K. Findley.

2. That all of the plaintiffs in the consolidated causes filed timely individual income tax returns for the calendar years 1921 and 1922, or such returns were filed for them by the Commissioner of Internal Revenue; that said returns were audited by the Commissioner of Internal Revenue, and a sixty day letter,
256 notifying plaintiffs of said proposed assessment, was sent to each of said plaintiffs, that none of said plaintiffs filed an appeal to the United States Board of Tax Appeals; that later the Commissioner of Internal Revenue timely assessed against each plaintiff the amount of taxes which he had theretofore proposed in the above mentioned sixty day letters, which taxes were paid to defendant by each of the plaintiffs, under protest.

3. That subsequently each plaintiff filed timely claims for refund with the Commissioner of Internal Revenue, which claims were in proper form, and that the bases for said claims of refund were the same as the bases for the petitions of plaintiffs in these suits; that some of said claims were rejected by the Commissioner, and thereafter and within two years from

such rejection suits for refund were filed, and in cases where such claims were not rejected by the Commissioner, more than six months elapsed before the instition of suit for refund, which were filed within four years from the time the taxes sought to be recovered were paid.

JOHN H. TUCKER,
FRED R. ANGEVINE,
Attorneys for Plaintiffs.

PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

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257 STIPULATION AS TO NET INCOME, DISTRIBUTIVE SHARES, ETC.

(Title Omitted.)

It is hereby stipulated that the tables hereafter set forth correctly state the net income of the J. E. Smitherman Special Account Partnership for the years 1921 and 1922, and of the George O. Baird partnership for the years 1921 and 1922, and the distributive shares thereof of each of the plaintiffs in these consolidated cases, and the net incomes and personal exemptions of each of said plaintiffs for the years 1921 and 1922, all as finally determined by the Commissioner of Internal Revenue, and upon which the Commissioner assessed against said plaintiffs the taxes sought to be recovered in these suits.

258 Table 1.

J. E. Smitherman, Special Account, Net Income and Distributive Interests of Plaintiffs for the Calendar Year 1921.

Suit Docket Number	Name of Plaintiff	Amount
1821	James E. Smitherman	$365,993.92
1822	Mrs. Ina. T. Smitherman	365,993.92
1823	Mrs. Loy L. Beene	54,899.08
1824	Loy L. Beene	54,899.08
1825	Mrs. R. A. Baucum	20,587.16
1826	R. A. Baucum	20,587.16
1827	Mrs. W. P. Baucum	41,174.32
1828	W. P. Baucum	41,174.32
1829	B. E. Baucum	41,174.32
1830	S. L. Beene	54,899.09
1831	Mrs. S. L. Beene	54,899.08
1832	Mrs. W. L. Beene	54,899.08
1833	Claude Beene	41,174.33
1834	Mrs. Claude Beene	41,174.32
1835	L. A. Beene	54,899.08
1836	J. R. Bevil	27,449.55
1837	Mrs. J. R. Bevil	27,449.54
1838	I. F. Callendar	32,532.79
1839	Mrs. I. F. Callendar	32,532.79
1840	G. Y. Harris	54,899.09
1841	Mrs. G. Y. Harris	54,899.09
1842	C. E. Miller	41,174.32
1843	Mrs. C. E. Miller	41,174.32
1844	Mrs. M. M. Morelock	54,899.08
1845	M. M. Morelock	54,899.09
1846	J. C. McEachern	54,899.09
1847	Mrs. J. C. McEachern	54,899.09
1848	R. G. Smitherman, Jr.	109,798.18

Suit Docket Number	Name of Plaintiff	Amount
1849	Mrs. Clotel Sherman Rivenback and Mrs. Minnie Brown Sherman	109,798.18
1850	Mrs. Minnie Brown Sherman	109,798.17
1851	T. D. Shockley	12,199.80
1852	Mrs. T. D. Shockley	12,199.79
1853	Mrs. J. Y. Snyder	115,577.03
1854	J. Y. Snyder	115,577.03
1855	A. H. Southern	82,348.65
1856	Mrs. A. H. Southern	82,348.64
1857	A. L. Waller	32,532.80
1858	Mrs. A. L. Waller	32,532.79
1859	Mrs. E. J. Waller	32,532.80
1860	E. J. Waller	32,532.79
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	731,987.84
1904	E. G. Palmer	365,993.92
1905	Mrs. E. G. Palmer	365,993.92
1925	D. D. Goode	54,899.09
1926	Mrs. Mattie Longino et al	54,899.09
	Total	$4,293,686.62

Partners not Plaintiffs.

	C. D. Keene	54,899.08
	B. W. Marston	54,899.08
	L. T. Waller	109,798.17
	S. J. Beene	109,798.17
	Total Net Income	$4,623,081.13

259 Table 2.

J. E. Smitherman, Special Account, Net Income and Distributive Interests of Plaintiffs for the Calendar Year 1922.

Suit Docket Number	Name of Plaintiff.	Amount
1821	James E. Smitherman	$98,148.01
1822	Mrs. Ina T. Smitherman	98,148.02
1823	Mrs. Loy L. Beene	14,722.20
1824	Loy L. Beene	14,722.20
1825	Mrs. R. A. Baucum	5,520.82
1826	R. A. Baucum	5,520.83
1827	Mrs. W. P. Baucum	11,041.65
1828	W. P. Baucum	11,041.65
1829	B. E. Baucum	11,041.66
1830	S. L. Beene	14,722.20
1831	Mrs. S. L. Beene	14,722.20
1832	Mrs. W. L. Beene	14,722.20
1833	Claude Beene	11,041.66
1834	Mrs. Claude Beene	11,041.65
1835	L. A. Beene	14,722.20
1836	J. R. Bevil	7,361.10
1837	Mrs. J. R. Bevil	7,361.10
1838	I. F. Callendar	8,724.27
1839	Mrs. I. F. Callendar	8,724.27
1840	G. Y. Harris	14,722.20
1841	Mrs. G. Y. Harris	14,722.20
1842	C. E. Miller	11,041.65
1843	Mrs. C. E. Miller	11,041.65
1844	Mrs. M. M. Morelock	14,722.20
1845	M. M. Morelock	14,722.20
1846	J. C. McEachern	14,722.20
1847	Mrs. J. C. McEachern	14,722.20
1848	R. G. Smitherman, Jr.	29,444.40

Suit Docket Number	Name of Plaintiff	Amount
1849	Mrs. Clotel Sherman Rivenback and Mrs. Minnie Brown Sherman	29,444.40
1850	Mrs. Minnie Brown Sherman	29,444.41
1851	T. D. Shockley	3,271.61
1852	Mrs. T. D. Shockley	3,271.60
1853	Mrs. J. Y. Snyder	30,994.11
1854	J. Y. Snyder	30,994.11
1855	A. H. Southern	22,083.31
1856	Mrs. A. H. Southern	22,083.30
1857	A. L. Waller	8,724.26
1858	Mrs. A. L. Waller	8,724.27
1859	Mrs. E. J. Waller	8,724.26
1860	E. J. Waller	8,724.27
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	196,296.03
1904	E. G. Palmer	98,148.01
1905	Mrs. E. G. Palmer	98,148.02
1925	D. D. Goode	14,722.20
1926	Mrs. Mattie Longino et al	14,722.20
	Total	$1,151,431.16

Partners not Plaintiffs.

	C. D. Keene	14,722.20
	B. W. Marston	14,722.20
	L. T. Waller	29,444.40
	S. J. Beene	29,444.40
	Total Net Income	$1,239,764.36

260 Table 3.

Net Income of Plaintiffs Derived from George O. Baird Partnership—Calendar Year 1921.

Suit Docket Number	Name of Plaintiff	Amount
1904	E. G. Palmer	$18,257.92
1905	Mrs. E. G. Palmer	18,257.92
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	36,515.83
	Partners not Plaintiffs.	
	J. A. Thigpen	36,515.84
	S. L. Herold	36,515.84
	Geo. O. Baird	36,515.84
	Total	$182,579.19
	Mrs. Herold	45,977.62
	Mrs. Thigpen	45,977.62
	Total	$91,955.25

Net Income Plaintiffs Derived from Thigpen-Herold-Palmer & Baird Partnership.

Suit Docket Number	Plaintiff	Amount
1904	E. G. Palmer	$15,713.71
1905	Mrs. E. G. Palmer	15,713.71
	Partners not Plaintiffs.	
	J. A. Thigpen	31,427.42
	S. L. Herold	31,427.42
	Geo. O. Baird	31,427.42
	Total	$125,709.68

IT:PA—PYA-ARM 12/21/26.

261 Table 4.

Net Income Members of Geo. O. Baird Partnership—Calendar Year 1922.

Suit Docket Number	Name of Plaintiff	Amount
1904	E. G. Palmer	$7,315.67
1905	Mrs. E. G. Palmer	7,315.66
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	14,631.32
	Partners not Plaintiffs.	
	J. A. Thigpen	14,631.33
	S. L. Herold	14,631.33
	Geo. O. Baird	14,631.33
	Total	$73,156.64
	Mrs. Herold	18,681.84
	Mrs. Thigpen	18,681.83
	Total	37,363.67

Net Income Members Thigpen-Herold-Baird-Palmer Partnership—Calendar Year 1922.

Suit Docket Number	Name of Plaintiff	Amount
1904	E. G. Palmer	$4,543.75
1905	Mrs. E. G. Palmer	4,543.74
	Partners not Plaintiffs.	
	J. A. Thigpen	9,087.50
	S. L. Herold	9,087.50
	Geo. O. Baird	9,087.50
	Total	$36,349.98

263 Table 5.

Net Income and Personal Exemption of Each Plaintiff for the Year 1921.

Docket Number	Name of Plaintiff	Net Income	Exemptions from Normal Tax
1821	James E. Smitherman...	$360,859.47	3,732.87
1822	Mrs. Ina T. Smitherman.	68,964.11	1,001.80
1823	Mrs. Loy L. Beene.....	360,859.46	3,732.87
1824	Loy L. Beene	68,957.84	2,200.00
1825	Mrs. R. A. Baucum.....	23,970.37	1,600.00
1826	R. A. Baucum.....	23,970.37	1,600.00
1827	Mrs. W. P. Baucum.....	51,431.13	2,400.00
1828	W. P. Baucum.....	51,431.13	2,400.00
1829	B. E. Baucum.....	48,227.62	2,400.00
1830	S. L. Beene.....	57,695.26	1,667.69
1831	Mrs. S. L. Beene.....	57,695.25	1,667.69
1832	Mrs. W. L. Beene.....	58,750.15	1,400.00
1833	Claude Beene	44,097.20	1,437.00
1834	Mrs. Claude Beene	44,097.20	1,037.00
1835	L. A. Beene	58,363.71	1,666.00
1836	J. R. Bevill	28,929.85	1,000.00
1837	Mrs. J. R. Bevil.....	28,929.85	1,000.00
1838	I. F. Calendar	37,060.07	1,825.00
1839	Mrs. I. F. Callendar.....	37,060.06	1,825.00
1840	G. Y. Harris	61,136.09	1,000.00
1841	Mrs. G. Y. Harris	61,136.09	1,000.00
1842	C. E. Miller	43,879.35	2,237.00
1843	Mrs. C. E. Miller.....	43,879.35	1,037.00
1844	Mrs. M. M. Morelock...	54,571.08	2,146.82
1845	M. M. Morelock.....	54,471.09	2,146.83
1846	J. C. McEachern	52,779.46	1,400.00
1847	Mrs. J. C. McEachern...	52,779.45	1,000.00
1848	R. G. Smitherman, Jr....	129,164.88	1,000.00
1849	Mrs. Clotel Sherman Rivenback and Mrs. Minnie Brown Sherman	114,821.43	1,589.62
1850	Mrs. Minnie Brown Sherman	114,821.43	1,589.62

Docket Number	Name of Plaintiff	Net Income	Exemptions from Normal Tax
1851	T. D. Shockley	14,460.04	1,000.00
1852	Mrs. T. D. Shockley.....	14,460.03	1,000.00
1853	Mrs. J. Y. Snyder.....	141,854.36	2,664.04
1854	J. Y. Snyder	141,854.36	2,664.04
1855	A. H. Southern	84,619.07	1,890.00
1856	Mrs. A. H. Southern....	84,619.06	1,090.00
1857	A. L. Waller	35,546.99	1,650.00
1858	Mrs. A. L. Waller	35,546.99	1,650.00
1859	Mrs. E. J. Waller	41,900.71	1,875.00
1860	E. J. Waller	41,900.71	1,875.00
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	811,525.67	1,714.50
1904	E. G. Palmer.....	436,571.40	5,952.37
1905	Mrs. E. G. Palmer.....	436,571.42	6,352.37
1925	D. D. Goode	57,906.39	2,800.00
1926	Mrs. Mattie Longino et al	58,729.09	2,030.00

263 Table 6.

Net Income and Personal Exemption of Each Plaintiff for the year 1922.

Docket Number	Name of Plaintiff	Net Income	Exemptions from Normal Tax
1821	James E. Smitherman....	$95,060.66	6,692.00
1822	Mrs. Ina T. Smitherman.	95,060.66	5,492.00
1823	Mrs. Loy L. Beene.....	20,710.43	1,030.60
1824	Loy L. Beene	20,287.30	2,200.00
1825	Mrs. R. A. Baucum.....	None	None
1826	R. A. Baucum.....	8,716.90	3,207.50
1827	Mrs. W. P. Baucum.....	15,506.19	1,007.50
1828	W. P. Baucum.....	15,506.19	3,807.50
1829	B. E. Baucum.....	8,701.87	2,407.50
1830	S. L. Beene.....	19,258.12	2,437.50
1831	Mrs. S. L. Beene.....	19,258.12	2,437.50
1832	Mrs. W. L. Beene.....	14,607.15	1,400.00
1833	Claude Beene	18,497.95	1,679.00

Docket Number	Name of Plaintiff	Net Income	Exemptions from Normal Tax
1834	Mrs. Claude Beene	18,497.95	1,279.00
1835	L. A. Beene	23,008.99	2,437.50
1836	J. R. Bevil	13,748.11	2,000.00
1837	Mrs. J. R. Bevil.....	None	None
1838	I. F. Callendar	12,256.16	2,600.00
1839	Mrs. I. F. Callendar.....	12,256.17	1,000.00
1840	G. Y. Harris	31,437.67	2,925.00
1841	Mrs. G. Y. Harris	None	None
1842	C. E. Miller	25,964.54	2,548.00
1843	Mrs. C. E. Miller.....	25,964.54	1,384.00
1844	Mrs. M. M. Morelock...	14,571.64	1,281.50
1845	M. M. Morelock.....	14,571.64	2,481.50
1846	J. C. McEachern	24,137.05	2,346.82
1847	Mrs. J. C. McEachern...	24,137.05	1,946.81
1848	R. G. Smitherman, Jr....	None	None
1849	Mrs. Clotel Sherman Rivenback and Mrs. Minnie Brown Sherman	32,282.73	2,190.00
1850	Mrs. Minnie Brown Sherman	32,282.74	2,190.00
1851	T. D. Shockley	7,578.54	2,160.00
1852	Mrs. T. D. Shockley.....	None	None
1853	Mrs. J. Y. Snyder.....	28,992.84	3,144.48
1854	J. Y. Snyder	28,992.83	4,344.48
1855	A. H. Southern	24,185.92	2,465.58
1856	Mrs. A. H. Southern....	24,185:92	1,665.58
1857	A. L. Waller	12,061.61	1,000.00
1858	Mrs. A. L. Waller	12,061.60	2,000.00
1859	Mrs. E. J. Waller	13,221.72	1,000.00
1860	E. J. Waller	13,221.72	2,200.00
1906	Mrs. J. K. Findley (Mrs. R. T. Layne)	239,255.90	2,128.50
1904	E. G. Palmer.....	119,178.28	10,834.60
1905	Mrs. E. G. Palmer.....	119,178.31	11,234.60
1925	D. D. Goode	23,519.98	2,933.75
1926	Mrs. Mattie Longino et al	26,247.19	2,096.00

264 It is further stipulated that the taxes herein sought to be recovered were paid to the defendant Jacob O. Bender, as Collector of Internal Revenue for the District of Louisiana, who still holds office as such Collector, by plaintiffs in these consolidated cases, who reside in Louisiana, and that the taxes herein sought to be recovered by plaintiffs Goode and Longino et als, residents of Arkansas, were paid to H. L. Remmell, the then Collector of Internal Revenue for the District of Arkansas, and who is now dead.

It is further stipulated that the tax returns of the plaintiffs for the years 1921 and 1922, were made on the cash receipts and disbursements basis.

It is hereby stipulated that the profit of the partnership on the sales of leases to the Gilliland Oil Company in the year 1921 was seven hundred thirty-five thousand, seven hundred fifty ($735,750.00) Dollars.

FRED R. ANGEVINE,
JOHN H. TUCKER,
Attorneys for Plaintiff.
PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

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265 MINUTES OF THE COURT.

Tuesday, Shreveport, La., February 18, 1930.

Court met pursuant to adjournment.

Present: Ben C. Dawkins, Judge, presiding, (and other Court officials).

(Title Omitted.)

On motion of U. S. Attorney Philip H. Mecom,

It was ordered that this case be fixed for trial on Monday, May 26th, 1930.

Ordered that Court adjourn.

Shreveport, Louisiana, Monday, May 26, 1930.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, presiding, (and other Court officials).

(Title Omitted.)

On motion of Mr. Mecom, Mr. Tucker agreeing, and with consent of the Court it was ordered that this case be submitted on stipulations to be later presented and filed.

Later, Mr. John H. Tucker introduced to the Court Mr. Fred R. Angevine, and requested that his name be entered, and that he be enrolled as associate counsel for the plaintiffs, and it was so ordered.

United States Attorney, Philip H. Mecom, introduced to the Court E. O. Hanson, Esq., and requested that his name be entered, and that he be enrolled as associated counsel for the defendants, and it was so ordered.

Whereupon the plaintiffs being represented by Messrs. Tucker and Angevine, and the defendants being represented by Messrs. Hanson, Mecom, and Hardin, the following proceedings were had, to-wit:

Mr. Tucker presented and filed the following documents:

1st. Stipulation to waive jury.

2nd. Stipulation to consolidate cases and to waive jury.

3rd. Stipulation in re filing of income tax returns.

4th. Stipulation as to Documentary evidence.

5th. Stipulation (Statement of facts as to George O. Baird partnership).

266 6th. Stipulation as to net income, distributive shares, etc.

7th. Exhibits, (documentary evidence from "A" to "Y" inclusive.

Thereupon, the case was then argued and submitted.

Mr. Hanson presented and filed a motion for judgment.

Whereupon, it was ordered, by the Court that the matter be submitted, and taken under advisement, with leave to counsel to file briefs and special requests for findings of fact by July 1st, 1930.

Ordered that Court adjourn.

Shreveport, La., Friday, March 13, 1931.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, presiding, (and other Court officials).

(Title Omitted.)

Assistant U. S. Attorney, J. Fair Hardin, appearing in open Court, and on his motion, in behalf of John H. Tucker, Jr., of counsel for the plaintiff herein,

It was ordered by the Court that sixty days be allowed herein for the preparation, presentation, settling and signing of bills of exception in this case.

Ordered that Court adjourn.

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267 Shereveport, Louisiana, Wednesday, June 10, 1931.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, presiding, (and other Court officials).

(Title Omitted.)

Appearances:
Messrs. Dart & Dart of New Orleans, La., and J. H. Tucker, Esquire, of Shreveport, La., for the plaintiff.

United States Attorney Philip H. Mecom, for the defendant.

Rulings on plaintiff's request for findings of fact and conclusions of law, were made as follows:

Requests for findings of fact, 1 to 29 inclusive. Granted.

Requests for conclusions of law:
Requests 1, 2, and 3 denied on authority of 40 Fed. (2) 892, 42 Fed. (2) 943.

Request 4 (a) denied.

Request 4 (b) and (c) granted.

Request 4, d, e, f, and g denied on authority of 40 Fed. (2) 892; 42 Fed. (2) 943.

Plaintiff excepted to denial of his requests for conclusions of law No. 1, 2, 3, 4, "a", "d", "e", "f", and "g", and reserves bill of exceptions.

Rulings on defendant's requests for findings of fact and conclusions of law were made as follows:

Requests for findings of fact Nos. 1 to 9 inclusive. Granted.

Requests 10 to 18 inclusive denied and the facts are found to be as stipulated in the record.

Requests 19 and 20 granted.

Requests for conclusions of law:

Requests 1 and 2 granted on authority of 40 Fed. (2) 892 and 42 Fed. (2) 943.

Requests 3 and 4 denied.

Request No. 5, first sentence granted; second sentence denied.

Plaintiff excepts to grant of defendant's requests for conclusions of law Nos. 1, 2 and the first sentence of No. 5 and reserves bill of exceptions.

268 Plaintiff filed requests for additional findings and conclusions of law on which the following rulings were made:

Requests Nos. 5, 6, 7, 8 and 10 denied on authority of 40 Fed. (2) 892 and 42 Fed. (2) 943. No. 9 granted.

Plaintiff excepts to denial of his additional request for conclusions of law Nos. 5, 6, 7, 8 and 10, and reserves bill of exception. Defendant excepts to grant of request No. 9 and reserves bill of exceptions.

Following ruling was made on plaintiff's motion for judgment after conclusion of evidence. "Denied in part. See written opinion." To which ruling, insofar as the same denied him judgment as prayed for, plaintiff excepted and reserved a bill of exceptions. To which ruling also the defendant excepted, insofar as the same granted judgment to plaintiff, and reserved his bill of exception.

Upon motion of plaintiff, the settlement of decree is hereby fixed for hearing at Shreveport, on June 19th, 1931.

Ordered that Court adjourn until tomorrow morning at 9:30 o'clock, Thursday, June 11th.

Shreveport, Louisiana, Friday, June 19, 1931.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, presiding, (and other Court officials).

(Title Omitted.)

Appearances:
John H. Tucker, Esquire, of counsel for the plaintiff.

H. S. Fessenden, Esquire, attorney from the General Counsel Office, Bureau of Internal Revenue, Washington, D. C., as attorney of record for defendant; also United States Attorney, Philip H. Mecom, Shreveport, La., for defendant.

This matter came on to be heard and settled on the judgment to be signed in this cause on this date, and the above counsel being present, the following proceedings were had, to-wit:

Mr. John H. Tucker of counsel for plaintiff presented and filed stipulation and agreement of the litigant parties herein by and through their respective counsel. Said counsel then presented and filed motion proposing computation of judgment, and tender of judgment in accordance therewith which was objected to by counsel for the defendant for the reason that the computation of tax for the year 1922 attached
269 thereto is not in conformity with the opinion rendered in this case on February 25, 1931, and for the further reason that a sufficient claim for refund for the year 1922 has not been filed as provided by Section 3228 of the Revised Statutes, and conse-

quently under Section 3228 of the Revised Statutes this Court lacks jurisdiction to grant judgment for the recovery of any income taxes for the year 1922 resulting from the extinguishment of the remaining undepleted costs of the lease and the remaining depreciable costs of the property thereon. Which objection was overruled; and to which ruling of the Court counsel for the defendant excepted and reserved the right to file a formal bill of exceptions.

Counsel for the Government and defendant herein tenders and files a form of judgment with computation made by the Government which the Court refused to sign and approve; and to which refusal on the part of the Court counsel for the defendant excepted and reserved a bill of exceptions.

The computation presented to the Court by counsel for the plaintiff was then approved and signed by the Court, and judgment in accordance therewith was also signed and filed. Counsel for the defendant excepting to the approval of said computation and the signing of said judgment reserved the right to file a formal bill of exceptions thereto.

The judgment signed herein was thereupon placed of record in Judgment Record, Volume No. 9, Folio 733.

Ordered that Court adjourn until Monday, June 22nd.

Shreveport, Louisiana, Thursday, June 25th, 1931.

Ordered that Court adjourn until Monday, October 5th, A. D. 1931.

270 Tuesday, Monroe, Louisiana, September 15, 1931.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, presiding; Charles B. Forshee, Chief Deputy Clerk.

(Title Omitted.)

Sam W. Mason, Esquire, of counsel for the plaintiff, and Philip H. Mecom, United States Attorney, representing the defendant, both being present, in open Court, on this date, the following proceedings were had, to-wit:

Counsel for the defendant presented to the Court additional special findings of fact and conclusions of law which had been filed on September 9th, 1931, on behalf of the defendant.

The request for additional findings of fact and conclusions of law on the part of the defendant was objected to by counsel for the plaintiff for the reason that the judgment has already been signed and the term has expired. And for the further reason that plaintiff has appealed, and if this application were considered he would have no opportunity to except, present bills of exceptions and include same in the record on appeal. And such request should have been made before judgment, and during the term in which the judgment was signed. Further, the request for additional findings of fact is unnecessary because of stipulation in the record. Objection overruled. Bill reserved by counsel for plaintiff.

Thereupon, the requests for additional special findings of fact presented to the Court by counsel for the

defendant were granted, and to which counsel for the plaintiff excepted and reserved a bill of exceptions. The additional request for conclusions of law presented to the Court by counsel for the defendant was denied, and to which counsel for the defendant excepted and reserved a bill of exceptions.

The United States Attorney for the defendant then presented to the Court the petition of Mrs. Agnes B. McGrawl Bender, praying that an order be granted directing that this action be revived in her name individually, as the surviving widow in community of Jacob O. Bender, deceased, and for and on behalf of her minor child, Hattie French Bender, issue of her marriage with Jacob O. Bender, deceased, and in the name of Marlin O. Bender, a major, said parties being the surviving widow in community and the legal representatives of Jacob O. Bender, deceased, who was the original defendant in this action, and in consideration of said petition, the following order was signed and filed:

See Order elsewhere in the Transcript.

271 E. G. Palmer

vs. No. 1904 At Law.

Mrs. Agnes B. McGrawl Bender and The Estate of Jacob O. Bender, deceased, late Collector of Internal Revenue for the District of Louisiana.

Counsel for the defendant then presented to the Court, for settling, allowing and signing, defendant's bills of exception numbered 1 to 8 inclusive. Counsel for the plaintiff objected to the settling, allowing and signing of said bills of exception on the grounds and for the reason that they come too late, and further because the time to present and settle exceptions on the part of the defendant has expired, and the Court is

without authority to grant or extend the time because of the expiration of the term of Court at which the judgment was rendered and signed, and for the further reason that the extended time has also expired. Objection overruled, and bills of exception numbered 1 to 8 inclusive signed. Bill reserved by counsel for plaintiff.

Counsel for the defendant then presented to the Court petition of defendants for an order of appeal, attaching thereto an assignment of errors, and in consideration thereof the following order of appeal was signed and filed, to-wit:

See Order elsewhere in the Transcript.

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272 ORDER TO SEND ORIGINAL DOCUMENTS WITH TRANSCRIPT.

(Title Omitted.)

On the suggestion of plaintiff, and with the concurrence of defendant, through their respective counsel, and considering it to be proper that the hereinafter designated original papers be inspected by the United States Circuit Court of Appeals for the Fifth Circuit, upon appeal,

It is hereby ordered that the following original papers, filed herein, to-wit:

Exhibit A. The partnership return for the year 1921 of the partnership, J. E. Smitherman, Special Account.

Exhibit B. The partnership return for the year 1922 of the partnership, J. E. Smitherman, Special Account.

Exhibit D. Partnership return of George O. Baird partnership for the year 1921.

Exhibit E. Partnership return for George O. Baird partnership for the year 1922.

Exhibit S. A map of part of Township 23 North, Range 8 West, Claiborne Parish, Louisiana, being identical with Exhibit No. 6 referred to in the narrative statement of evidence above referred to except that the colors shown on said map have been changed as follows:

The yellow color represents acreage in the main producing field, known as the Haynesville Oil Field, transferred by J. E. Smitherman to the Ohio Oil Co.;

The red color represents the acreage transferred to the Gilliland Oil Co.; and

The pink color represents the acreage transferred by J. E. Smitherman to the Louisiana Oil & Refining Company prior to the bringing in of the discovery well.

Exhibit T. The individual income tax return for E. G. Palmer for the year 1921.

Exhibit U. The individual income tax return for E. G. Palmer for the year 1922.

273 Exhibit Z 1. Claim for refund, E. G. Palmer, 1921.

Exhibit Z 2. Amended claim for refund, E. G. Palmer, 1921.

Exhibit Z 3. Claim for refund, E. G. Palmer, 1922.

Exhibit Z 4. Amended claim for refund, E. G. Palmer, 1922.

be transmitted by the Clerk of this Court, along with the transcript of the proceedings here, for the consideration by the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, in connection with said transcript, such original records to remain in the custody of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, until final disposition of this cause on appeal, when they shall be returned to the Clerk of this Court.

Done at Shreveport, Louisiana, this 27th day of June, 1931.

BEN C. DAWKINS,
Judge.

Filed June 27, 1931.

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274 EXTENSION OF TIME FOR FILING TRANSCRIPT.

(Title Omitted.)

On motion of E. G. Palmer, herein represented by his attorneys, Dart & Dart, and on suggestion that the Clerk of the United States District Court has advised that it will be impossible for him to complete the transcript of appeal in this case within time to file it on or before July 27th, the return day thereof, and that an extension of ninety (90) days should be granted for that purpose, as set forth in the certificate of the Clerk hereto annexed;

It is ordered that an extension of ninety days, expiring October 27th, be and it is hereby granted for the

purpose of completing and filing the transcript in this case, and that the return date of appeal be and it is hereby extended to October 27th, 1931.

New Orleans, La., July 25, 1931.

(Signed) RUFUS E. FOSTER,
Judge.

O. K.
OAKLEY F. DODD, Clerk.

Filed July 29th, 1931.

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275 PRAECIPE FOR TRANSCRIPT OF RECORD.

(Title Omitted.)

To the Honorable W. B. Lee, Esquire, Clerk of the United States District Court for the Western District of Louisiana:

You are hereby requested to make a transcript of record and to file the same in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to appeal allowed in the above entitled cause on June 27, 1931, and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Petition and citation.

2. Answer.

3. Stipulation waiving jury.

4. Motion by plaintiff for judgment and ruling thereon.

5. Motion by defendant for judgment and ruling thereon.

6. Plaintiff's requests for findings of fact and conclusions of law, and rulings thereon, supplemental requests for findings of conclusions of law.

7. Defendant's requests for findings of fact and conclusions of law, and rulings thereon.

8. Stipulations of facts, George O. Baird partnership matter.

9. Opinion of the Court.

10. Computation of judgment and motion to approve, and ruling thereon.

11. Judgment.

12. Motion for enlargement of time to file bills of exception, and order.

13. Plaintiff's Bills of Exception 1 to 5 Incl.

276 14. Petition for appeal, Order; Assignment of Errors.

15. Bond and approval thereof, citation of appeal and service.

16. Stipulation as to documentary evidence.

17. Exhibit C. Audit letters from the Commissioner of Internal Revenue redetermining the net income of the partnership, J. E. Smitherman, Special Account, for the years 1921 and 1922.

Exhibit F. Audit letters from the Commissioner of Internal Revenue redetermining the net income of the George O. Baird partnership for the years 1921 and 1922.

Exhibit V. The sixty day letter from the Commissioner of Internal Revenue to E. G. Palmer, containing notice of the proposed assessment resulting from the audit of his income tax returns for the years 1921 and 1922.

18. Exhibit H. Oil and gas lease from Mrs. Anna Taylor et al to J. E. Smitherman. (Page 86).

Exhibit I. Oil and Gas Lease from Mrs. Anna Taylor et al to J. E. Smitherman (Page 92).

Exhibit J. Oil and Gas Lease from H. P. Camp to J. E. Smitherman (Page 97).

Exhibit K. Oil and Gas lease from G. W. Taylor to J. E. Smitherman (Page 102).

19. Exhibit L. Transfer from James E. Smitherman to Gilliland Oil Co. (Page 106).

Exhibit M. Working agreement, James E. Smitherman and Gilliland Oil Co. (Page 108).

Exhibit R. Transfer, James E. Smitherman to Gilliland Oil Co.

20. Exhibit N. Transfer, James E. Smitherman to Ohio Oil Co. (Page 115).

Exhibit O. Working agreement, James E. Smitherman and Ohio Oil Co. (Page 119).

Exhibit P. Letter from Ohio Oil Co. to James E. Smitherman (Page 123).

Exhibit Q. Transfer, James E. Smitherman to Ohio Oil Co.

21. Exhibit W. Transfer from George O. Baird to J. Rogers Flannery, copy of which is attached to the record of suit of Baird v. Flannery filed herein as Exhibit X.

Exhibit X. Record in the suit of George O. Baird vs. J. Rogers Flannery, No. 5211, Third Judicial Court of Louisiana in and for Claiborne Parish.

Exhibit Y. Agreement between George O. Baird and Gulf Refining Co. of Louisiana.

22. Original documents to be sent in accordance with Order of Court dated June 27, 1931, to-wit:

Exhibit A. The partnership return for the year 1921 of the partnership, J. E. Smitherman, Special Account.

Exhibit B. The partnership return for the year 1922 of the partnership, J. E. Smitherman, Special Account.

277 Exhibit D. Partnership return of George O. Baird partnership for the year 1921.

Exhibit E. Partnership return for George O. Baird partnership for the year 1922.

Exhibit S. A map of part of Township 23 North, Range 8 West, Claiborne Parish, Louisiana, being identical with Exhibit No. 6 referred to in the narrative

statement of evidence above referred to except that the colors shown on said map have been changed as follows:

The yellow color represents acreage in the main producing field, known as the Haynesville Oil Field, transferred by J. E. Smitherman to the Ohio Oil Co.;

The red color represents the acreage transferred to the Gilliland Oil Co.; and

The pink color represents the acreage transferred by J. E. Smitherman to the Louisiana Oil & Refining Company prior to the bringing in of the discovery well.

Exhibit T. The individual income tax return for E. G. Palmer for the year 1921.

Exhibit U. The individual income tax return for E. G. Palmer for the year 1922.

Exhibit Z 1. Claim for refund, E. G. Palmer, 1921.

Exhibit Z 2. Amended claim for refund, E. G. Palmer, 1921.

Exhibit Z 3. Claim for refund, E. G. Palmer, 1922.

Exhibit Z 4. Amended claim for refund, E. G. Palmer, 1922.

23. Stipulation of facts and filings in evidence, filed June 19, 1931. Exhibits Z1, Z2, Z3 and Z4 to be sent in original. (See Court Order of June 27, 1931.)

24. Stipulation regarding filing returns and claims for refund.

25. Stipulation as to distributive shares, net income, etc.

26. Minutes of Court.

27. Order to send original documents.

28. This praecipe and acknowledgment of notice.

Dated at Shreveport, Louisiana, this 30th day of June, 1931.

(Signed) FRED R. ANGEVINE,
Fred R. Angevine,

(Signed) DART & DART,
Dart & Dart,

(Signed) SMITHERMAN, TUCKER & MASON,
Smitherman, Tucker & Mason,

By JOHN H. TUCKER, JR.,
John H. Tucker, Jr.
Attorneys for Appellant.

Filed June 30, 1931.

278 Service of the above Praecipe accepted and acknowledged, this 30th day of June, 1931.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana, Attorney for Appellee.

279 SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD.

(Title Omitted.)

To the Honorable W. B. Lee, Esquire, Clerk of the United States District Court for the Western District of Louisiana:

You are hereby requested to make and add to the transcript of record to be made and filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to appeal allowed in the above entitled cause on June 27, 1931, and to include in said transcript, the following document, to-wit:

24½. Stipulation to consolidate cases, waive jury and hold in abeyance.

29. This supplemental praecipe and acknowledgment thereon.

Dated at Shreveport, Louisiana, this 6th day of July, 1931.

(Signed) JOHN H. TUCKER, JR.,
John H. Tucker, Jr.
Attorney for Plaintiff and Appellant.

Service of the above supplemental praecipe accepted and acknowledged this 6th day of July, 1931.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana, Attorney for Defendant and Appellee.

Filed Oct. 12, 1931.

280 In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

E. G. Palmer,

vs. No. 1904 Law.

Mrs. Agnes B. McGrawl Bender and The Estate of Jacob O. Bender, deceased, late collector of Internal Revenue for the District of Louisiana.

To the Honorable W. B. Lee, Clerk of the United States District Court for the Western District of Louisiana:

You are hereby respectfully requested to make up a transcript of record and file the same in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, pursuant to order of appeal allowed the defendants in the above entitled cause on September 15th, 1931, and to include in such transcript of record the following documents and exhibits and no other, to-wit:

1. Stipulation to consolidate cases and to waive Jury, filed May 26, 1930.

2. Form of Judgment with Computation attached, tendered by Defendant. Filed June 19, 1931.

3. Defendant's Requests for Additional Special Findings of Fact and Conclusions of Law.

4. Petition to Revive action in name of Mrs. Agnes B. McGrawl Bender et al., and order thereon.

5. Defendant's Petition for Appeal, Assignment of Errors and Order thereon.

6. Defendant's Bills of Exceptions Nos. 1 to 8, inclusive.

7. Citation of Appeal and return thereon.

8. Minutes of Court, including adjournment on June 25th, 1931, to October 5th, 1931.

9. This Praecipe.

281 10. It is also desired that all of the papers and exhibits included in the praecipe of the plaintiff and appellant, dated June 30th, 1931, and heretofore filed in this proceeding, be included in the transcript which you make, but it is not desired that these documents appear more than once in said transcript.

Shreveport, Louisiana, September 18th, 1931.

PHILIP H. MECOM,
United States Attorney and
Attorney for Defendants
and Appellants.

Service of the above praecipe accepted and acknowledged on this September 30th, 1931.

JOHN H. TUCKER, JR.,
Attorney for Plaintiff and
Appellee, E. G. Palmer.

Filed Sept. 30, 1931.

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282 STIPULATION TO CONSOLIDATE CASES AND TO WAIVE JURY.

(Title Omitted.)

It is hereby stipulated between the parties to the above numbered and entitled cause and to the causes hereinafter set forth that the said causes of action be consolidated for the purpose of trial. The said causes so consolidated with the above entitled cause are:

No. 1821, James E. Smitherman vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1822, Mrs. Ina T. Smitherman vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1823, Mrs. Loy L. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1824, Loy L. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1825, Mrs. R. A. Baucum vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1826, R. A. Baucum vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1827, Mrs. W. P. Baucum vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1828, W. P. Baucum vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

283 No. 1829, B. E. Baucum vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1830, S. L. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1831, Mrs. S. L. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1832, Mrs. W. L. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1833, Claude Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1834, Mrs. Claude Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1835, L. A. Beene vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1836, J. R. Bevill vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1837, Mrs. J. R. Bevill vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1838, I. F. Calendar vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1839, Mrs. I. F. Calendar vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1840, G. Y. Harris vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1841, Mrs. G. Y. Harris vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

284 No. 1842, C. E. Miller vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1843, Mrs. C. E. Miller vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1844, Mrs. M. M. Morelock vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1845, M. M. Morelock vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1846, J. C. McEachern vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1847, Mrs. J. C. McEachern vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1848, R. G. Smitherman, Jr., vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1849, Mrs. Clotel Sherman Rivenbark and Mrs. Minnie Brown Sherman vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1850, Mrs. Minnie Brown Sherman vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1851, T. D. Shockley vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1852, Mrs. T. D. Shockley vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1853, Mrs. J. Y. Snyder vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

285 No. 1854, J. Y. Snyder vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1855, A. H. Southern vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1856, Mrs. A. H. Southern vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1857, A. L. Waller vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1858, Mrs. A. L. Waller vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1859, Mrs. E. J. Waller vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1860, E. J. Waller, vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1906, Mrs. J. K. Findley, vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1905, Mrs. E. G. Palmer vs. Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana.

No. 1925, D. D. Goode vs. United States of America.

No. 1926, Mrs. Mattie Longino et al. vs. United States of America.

It is further stipulated that judgment shall be rendered only in the cause of E. G. Palmer vs. Jacob D. Bender No. 1904, on the docket of this Court, and that all of the other cases above mentioned in which trial by jury is hereby waived in each case, shall be held in abeyance pending the final determination of said suit by a Court of last resort and shall be governed and controlled by the decision so rendered.

286 It is hereby stipulated that after decision is rendered herein by the Court, the final decree shall be computed in accordance therewith and in the event the parties cannot agree as to said computation, then the matter shall be settled by the Court.

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
Attorneys for Plaintiff.
PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed May 26, 1930.

287 FORM OF JUDGMENT WITH COMPUTATION ATTACHED.

(Title Omitted.)

The above numbered and entitled cause coming on for hearing, the parties through their respective attorneys announced ready for trial and a waiver of trial by jury having been duly made and filed by the parties, he Court thereupon proceeded with the trial without jury. The evidence for both parties was introduced and completed and both parties rested their case. Thereupon, the cause was argued to the Court and after full consideration and submission and consideration of briefs filed by both parties, and the Court being advised in the premises finds that plaintiff is entitled to recover his proportionate share of the income taxes assessed against the $350,000.00 paid by the Gulf Refining Company to Munhall, it is hereby

Ordered, adjudged and decreed that E. G. Palmer have and recover judgment from Jacob O. Bender, as Collector of Internal Revenue for the District of Louisiana, in the full sum of Nine Thousand One Hundred Fifty Two & 1/100 Dollars ($9,152.01), as shown by the computation of tax attached hereto, with legal interest thereon from January 3, 1927.

It is further ordered, adjudged and decreed that the payment of this judgment in full and all interest due thereon shall constitute full satisfaction of all refunds of income tax due the said E. G. Palmer for the years 1921 and 1922.

The Court hereby certifies that there was probable and reasonable cause for the act of the defendant, the Collector of Internal Revenue, in demanding and collecting from the plaintiff the internal revenue tax, for the refund of which this judgment is entered.

Thus done, read aloud and signed in open Court at Shreveport, Louisiana, on this 19th day of June, 1931.

....., Judge.

288 STATEMENT.

Adjustment of George O. Baird Partnership Income.

George O. Baird Partnership Interest.

Year ended December 31, 1921.

Partnership income distributable, Bureau letter dated December 21, 1926		$182,579.19
Deduct:		
(a) Income from sale of oil lease as computed in Bureau letter of December 21, 1926	$141,496.78	
(b) Extinguishment of investment	11,491.53	152,988.31
Partnership income distributable as revised		$29,590.88

Explanation of Changes.

(a) Computation of the profit derived from the sale of oil leases during the year 1921 accruing to the George O. Baird Partnership interest and the Thigpen-Herold interest:

Sale price	$350,000.00
3/4 interest of the above	262,500.00

Remaining cost of the depletable property sold:		
George O. Baird Partnership	$2,218.72	
Thigpen and Herold	1,109.36	
Total	$3,328.08	
Remaining cost of depreciable property	46,926.74	50,254.82
Profit		$212,245.18
Distribution of the above:		
George O. Baird partnership		$141,496.78
Thigpen and Herold		70,748.40
Total		$212,245.18

This item is eliminated due to the judgment of the District Court for the Western District of Louisiana.

289 Adjustment of George O. Baird Partnership Income.

Year ended December 31, 1921.

(b) The amount of $22,983.06 representing cost, or extinguishment of investment, has been allowed for 1921, and is divided as follows:

George O. Baird partnership	$11,491.53
Thigpen-Herold	5,745.76
Thigpen-Herold-Baird-Palmer	5,745.77
Total	$22,983.06

Distribution.

George O. Baird, 20%	$5,918.18
E. G. Palmer, 20% (½ to Mrs. Palmer—$2,959.09)	5,918.18
R. T. Layne, 20% (Mrs. J. K. Findley)	5,918.18
J. A. Thigpen, 20%	5,918.17
S. L. Herold, 20%	5,918.17
Total as above	$29,590.88

Thigpen, Herold, Baird, Palmer Interests.

Distributive income, Bureau letter dated December 21, 1926		$126,709.68
Deduct:		
(a) Income from sale of oil lease as computed in Bureau letter of December 21, 1926	$41,639.92	
(b) Extinguishment of investment	5,745.77	47,385.69
Distributive income as revised		$78,323.99

Explanation of Changes.

(a) Computation of profit on sale of oil leases during 1921 accruing to the Thigpen-Herold-Baird-Palmer interest:		
Sale price		$350,000.00
One-fourth thereof to the above		87,500.00
Remaining cost of depletable property sold	$29,830.95	
Remaining cost of depreciable property sold	16,029.13	45,860.08
profit		$41,639.92

290 Adjustment of George O. Baird Partnership Income.

Year ended December 31, 1921.

(b) The amount of $22,983.06 representing cost, or extinguishment of investment, has been allowed for 1921, and is divided as follows:

George O. Baird partnership	$11,491.53
Thigpen-Herold	5,745.76
Thigpen-Herold-Baird-Palmer	5,745.77
Total	$22,983.06

Distribution.

J. A. Thigpen, 25%	$19,580.99
S. L. Herold, 25%	19,581.00
Geo. O. Baird, 25%	19,581.00
E. G. Palmer, 25% (½ to Mrs. Palmer—$9,790.50	19,581.00
Total as above	$78,323.99

291 In re: E. G. Palmer, v. Bender, Collector—Law No. 1904.

Year ended December 31, 1921.

Net income as previously computed by Bureau		$436,571.40
Share of George O. Baird Partnership Income included therein	$18,527.92	
Share of Thigpen, Herold, Baird, Palmer interests included therein	15,713.71	
Total included by Bureau	$33,971.63	

As Revised:			
Share of George O. Baird Partnership income ...	$2,959.09		
Share of Thigpen, Herold, Baird, Palmer interests	9,790.50	12,749.59	
Reduction in individual income			21,222.04
Net income as revised			$415,349.36
Less:			
Exemption		$1,000.00	
Dividends		3,413.98	
Interest on United States Obligations		1,538.39	5,952.37
Balance subject to normal tax			$409,396.99

Computation of Tax.		Tax.
Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $405,396.99		32,431.76
Surtax on $415,349.36	$210,180.10	
Surtax under Article 13, Regulations 62		99,970.28
Total tax		$132,562.04
Tax previously paid:		
March 15, 1922	$12,575.30	
January 3, 1927	129,138.75	
Total tax previously paid		141,714.05
Overpayment		$9,152.01

292 In re: E. G. Palmer v. Bender, Collector—Law No. 1904.

Computation of Surtax, Article 13, Regulations 62.

(1) Net Income	$415,349.36
(2) Income from sale of minerals	360,125.08
Percentage of (2) to (1)	.86704137
Surtax (ordinary)	$210,180.10
Portion of surtax due to minerals (.86704137)	182,234.84
Limitations—20% of selling price	72,025.02
Surtax on income from minerals	$72,025.02
Surtax due to other income ($210,180.10—$182,234.84)	27,945.26
Total surtax under Article 13, Regulations 62	$99,970.28

293 DEFENDANT'S REQUESTS FOR ADDITIONAL SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Title Omitted.)

The defendant, considering the additional facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, requests the Court to find the same as follows:

I.

The net income received from the Gulf Refining Company on oil payments from the Langston Lease, in accordance with the instrument of November 16,

1921, appearing as part of the record as Exhibit Y_2 and included in gross income from oil sales, is as follows:

Year.	Total	George O. Baird Partnership	Mrs. Thigpen Mrs. Herold.	Thigpen-Herold Baird-Palmer.
1921	$22,983.06	$11,491.53	$5,745.76	$5,745.77
1922	181,765.25	90,882.62	45,441.32	45,441.31

Granted. Plaintiff excepts.

II.

The total remaining undepleted costs of the Langston Lease and the remaining costs of the depreciable property transferred to the Gulf Refining Company on November 16, 1921, was $96,114.90. If the payments received from the transfer of said lease are first applied to extinguish the cost of the property transferred, an allocation of the costs to the years 1921 and 1922 and to the various partnership interests is reflected in the following table:

Year.	Total	George O. Baird Partnership	Mrs. Thigpen Mrs. Herold.	Thigpen-Herold Baird-Palmer.
1921	$22,983.06	$11,491.53	$5,745.76	$5,745.77
1922	73,131.84	22,011.68	11,005.84	40,114.31

Granted. Plaintiff excepts.

294 III.

The Commissioner of Internal Revenue in his final determination of the net income accruing from the

transfer of the Langston Lease to the Gulf Refining Company on November 16, 1921, as shown in Bureau letter of December 21, 1926, addressed to the George O. Baird Partnership, said letter being in evidence as Exhibit F, applied and allocated said total costs of $96,114.90, as extinguishment of capital investment, against the payment of $350,000.00, then considered by the Commissioner of Internal Revenue to be part of the sale price of said Langston Lease, increasing net income by $253,855.10.

Granted. Plaintiff excepts.

IV.

On May 5, 1928, plaintiff filed claim for refund of Federal income taxes for the calendar year 1921 in the amount of $166,219.26 copy of which was received in evidence attached to a stipulation of facts as Exhibit Z-1, by this reference made a part hereof the same as if set out herein in full.

Granted. Plaintiff excepts.

V.

On June 20, 1929, plaintiff filed claim for refund of Federal income taxes for the calendar year 1921 in the amount of $166,219.26 copy of which was received in evidence and was attached to stipulation of facts filed in this cause as Exhibit Z-2, which by this reference is made a part hereof the same as if set out herein in full.

Granted. Plaintiff excepts.

VI.

On May 5, 1928, plaintiff filed claim for refund of Federal income taxes for the calendar year 1922 in

the amount of $46,718.54, copy of which was received in evidence and was attached to a stipulation of facts filed in this cause as Exhibit Z-3, which by this reference is made a part hereof the same as if set out herein in full.

Granted. Plaintiff excepts.

295 VII.

On June 20, 1929, plaintiff filed a claim for refund of Federal income taxes for the calendar year 1922 in the amount of $46,718.54, copy of which was received in evidence and was attached to a stipulation of facts filed in this cause as Exhibit Z-4, which by this reference is made a part hereof the same as if set out herein in full.

Granted. Plaintiff excepts.

Additional Conclusions of Law.

And from the foregoing findings of fact, defendant requests the Court to decide as conclusions of law:

I.

That claims for refund for the year 1922 relate to depletion and nowhere in said claims did plaintiff request the Commissioner of Internal Revenue to deduct from, or offset against, the oil payments received in connection with the Langston Lease, that part of the cost of said lease remaining unextinguished at the end of 1921; that said claims are insufficient and are based upon other and different grounds than a right to charge against the oil payments received in the year 1922, any part of the original cost of the capital investment in said Langston Lease; that said claims

for refund for the year 1922 are insufficient within the meaning of Section 3226 of the Revised Statutes and even if plaintiff is entitled to any adjustment in income and a resulting reduction in tax liability, plaintiff may not recover as to said year because of the insufficiency of the claims.

Denied. Defendant excepts.

PHILIP H. MECOM,
E. O. HANSON,
Attorneys for Defendant.

Filed Sept. 9, 1931.

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296 Filed Sept. 15, 1931.

(Title Omitted.)

The petition of Mrs. Agnes B. McGrawl Bender, a widow, a resident of the City of New Orleans, State of Louisiana, and of the United States of America, appearing through Philip H. Mecom, United States Attorney for the Western District of Louisiana, respectfully represents:

1.

That this is an action by a taxpayer against the defendant, Jacob O. Bender, individually and as Collector of Internal Revenue for the District of Louisiana, to recover taxes alleged to have been illegally collected by the said defendant, who was in office at the time this suit was filed.

2.

That final judgment was rendered and signed herein against the said defendant, Jacob O. Bender, indivi-

dually and as Collector of Internal Revenue for the District of Louisiana, at Shreveport, Louisiana, on June 19, 1931, in which judgment the Court certified that there was probable cause for the said collector to collect the taxes involved in this litigation.

3.

That this is an action in personam against the said defendant and that the said original defendant in this case, Jacob O. Bender, Collector of Internal Revenue for the District of Louisiana, died intestate in the City of New Orleans, Louisiana, on August 25, 1931, leaving as his heirs and legal representatives your petitioner, Mrs. Agnes B. McGrawl Bender, surviving partner in community, and two children, issue of the marriage of your petitioner, Mrs. Agnes B.
297 McGrawl Bender, and the deceased, to-wit, Marlin O. Bender, a major son, and Hattie French Bender, 16 years of age, a minor daughter; that your said petitioner, Mrs. Bender, has applied to the Honorable Civil District Court for the Parish of Orleans, Louisiana, to be appointed administratrix of the succession of the said Jacob O. Bender, deceased, and to qualify as natural tutrix for her said minor daughter, Hattie French Bender, but that the necessary formalities of law to consummate said proceedings cannot be observed and complied with until after September 18, 1931.

4.

That your petitioners desire to apply to this Honorable Court for an order directing an appeal from the judgment rendered herein on June 19, 1931, to the Honorable United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and in order to do so prior to the close of September 18,

1931, which is the last date the law allows a petition for an appeal in this case, petitioners desire to have the action herein revived in the name of Mrs. Agnes B. McGrawl Bender as the surviving widow in community and also as acting for and on behalf of Hattie French Bender, her minor child aforesaid, and the said Marlin O. Bender, the legal representatives of the said Jacob O. Bender, the original defendant in this suit.

Wherefore, petitioners pray for an order of this Honorable Court directing this action to be revived in the name of Mrs. Agnes B. McGrawl Bender, individually, as the surviving widow in community of Jacob O. Bender, deceased, and for and on behalf of her minor child, Hattie French Bender, issue of her marriage with Jacob O. Bender, deceased, and in the name of Marlin O. Bender, a major, said parties being the surviving widow in community and the legal representatives of Jacob O. Bender, deceased, who was the original defendant in this action.

They further pray for all orders and decrees necessary in the premises, and for general relief.

PHILIP H. MECOM,
United States Attorney and
Attorney for Petitioner,
Mrs. Agnes B. McGrawl
Bender.

298 AFFIDAVIT.

State of Louisiana,
Parish of Caddo.

Philip H. Mecom, being duly sworn, deposes and says: That he is the attorney for the petitioners in the foregoing petition; that petitioner, Mrs. Agnes B.

McGrawl Bender, is absent from the Parish of Caddo and it is impracticable to have her verify the foregoing petition; that he has read the foregoing allegations of fact and that same are true and correct, according to the best of his knowledge, information and belief, said information having been furnished him as United States Attorney from official and other sources, and particularly from Edgar M. Cahn, Esquire, attorney, of New Orleans, Louisiana, who is the attorney representing Mrs. Bender in the Civil District Court proceedings at New Orleans, Louisiana, in the matter of the estate of Jacob O. Bender, deceased.

PHILIP H. MECOM.

Sworn to and subscribed before me on this 14 day of September, 1931.

NELL ILLIEN,

(Seal) Notary Public.

299 ORDER.

Considering the foregoing petition and affidavit, it is hereby ordered that the above entitled and numbered suit be revived in the name of Mrs. Agnes B. McGrawl Bender, individually, as the surviving widow in community, and for and on behalf of her minor daughter, Hattie French Bender, and in the name of Marlin O. Bender, a major, said persons being the surviving widow in community and legal representatives of the estate of Jacob O. Bender, deceased, the late Collector of Internal Revenue for the District of Louisiana, and original defendant in said action.

Done and signed at Monroe, Louisiana, on this 15 day of September, 1931.

BEN C. DAWKINS, Judge.

Filed Sept. 15, 1931.

300 In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

Filed Sept. 15, 1931.

E. G. Palmer, Plaintiff,
vs. No. 1904 Law.
Mrs. Agnes B. McGrawl Bender and The Estate of Jacob O. Bender, deceased, late Collector of Internal Revenue for the District of Louisiana, Defendants.

The petition of Mrs. Agnes B. McGrawl Bender, individually as the surviving widow in community, and for and on behalf of her minor child, Hattie French Bender, and of Marlin O. Bender, a major, the surviving spouse and legal representatives of the estate of Jacob O. Bender, deceased, now appearing through Philip H. Mecom, United States Attorney for the Western District of Louisiana, respectfully shows:

1.

That the petitioners are the defendants in the above styled and numbered cause; that a final judgment was rendered and signed in the above cause at Shreveport, Louisiana, on June 19th, 1931, by which judgment your petitioners and defendants are aggrieved and desire to appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and attach hereto their assignment of errors upon which they rely for their appeal and application for the relief herein.

Wherefore, they pray for citation hereof to plaintiff as is required by law and that an order issue allowing

said appeal, and that they be relieved from giving bond in the premises, and for such further orders as may be necessary in the premises.

PHILIP H. MECOM,
United States Attorney for the Western District of Louisiana, Attorney for Defendants.

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301 ASSIGNMENT OF ERRORS.

In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

E. G. Palmer, Plaintiff,
versus No. 1904 Law.
Mrs. Agnes B. McGrawl Bender, and the Estate of Jacob O. Bender, Deceased, late Collector of Internal Revenue for the District of Louisiana, Defendant.

Now comes the defendants by Philip H. Mecom, United States Attorney for the Western District of Louisiana, Shreveport Division, and in connection with her appeal assigns that in the record and proceedings and judgment entered in the above entitled cause, there are manifest errors appearing therein to her prejudice in this, to-wit:

I.

That the Court erred in ordering that there be judgment in favor of plaintiff, E. G. Palmer, and against the defendant, Jacob O. Bender, Collector of

Internal Revenue, in the sum of $11,797.33 for the year 1921 and $4,926.43 for the year 1922, together with interest thereon and costs.

II.

That the Court erred in refusing to direct that judgment be entered in favor of the defendant in this suit and against the plaintiff dismissing plaintiff's petition herein.

302

III.

That the Court erred in refusing to grant defendant's formal motion for judgment.

IV.

That the Court erred in refusing to grant each and every part of defendant's Tenth to Eighteenth, inclusive, requests for special findings of fact, and in refusing to find as conclusions of law, the matters set out in Paragraphs III and IV of defendant's requests for conclusions of law.

V.

That the Court erred in refusing to find as a conclusion of law, the matters set out in defendant's requests for additional conclusions of law.

VI.

That the Court erred in finding the facts requested by plaintiff in Paragraphs 9, 10, 12 to 17, inclusive, 19 and 20, as set out in plaintiff's requests for findings of fact.

VII.

That the Court erred in finding as conclusions of law the matters set out in Paragraph 4(b) and (c) of plaintiff's request for conclusions of law.

VIII.

That the Court erred in approving plaintiff's computation of the amount of the judgment to be computed in accordance with the opinion and findings of the Court.

IX.

That the Court erred in ruling as a matter of law that the claims for refund filed herein fully, completely and in detail show the matters arising out of the transactions of the George O. Baird Partnership involved herein.

X.

That the Court erred in approving plaintiff's motion filed on June 19, 1931, relating to the computation of the judgment to be rendered in this cause and
303 particularly in approving and entering judgments in accordance with Paragraphs 1, 2, 3, 6, 7 and 8 of said motion.

XI.

That the Court erred in overruling defendant's objection to the sufficiency of the claims for refund filed by plaintiff with respect to the year 1922.

XII.

That the Court erred in refusing to accept defendant's computation of the amount of the judgment to be entered in favor of plaintiff pursuant to the findings of fact previously found by the Court.

XIII.

That the Court erred in ruling and holding in the opinion filed February 25, 1931, that plaintiff is entitled to recover his proportionate share of the income taxes assessed against the $350,000.00 paid by the Gulf Refining Company to Mulhall.

XIV.

That the Court erred in that the facts found do not support the judgment ordered to be entered by the Court.

XV.

That the Court erred in that the stipulated facts do not support the judgment ordered to be entered by the Court.

XVI.

That the Court erred in granting plaintiff's formal motion for judgment to the extent indicated in Paragraph I hereof.

By reason whereof, the appellants pray that the aforesaid judgment may be reversed.

PHILIP H. MECOM,
Philip H. Mecom,
United States Attorney for the Western District of Louisiana.

304 ORDER.

Considering the foregoing application, it is ordered that said appeal be allowed, returnable to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, according to law; that due

notice of said appeal be given to the plaintiff, E. G. Palmer, and that the Clerk of this Court make and transmit to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, a transcript of the record in this case under his certificate.

Done and signed at Monroe, Louisiana, on this 15 day of September, 1931.

BEN C. DAWKINS, Judge.

Filed Sept. 15, 1931.

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305 BILL OF EXCEPTIONS No. 1.

(Title Omitted.)

Be it remembered, that on July 16, 1930, at the conclusion of the trial hereof, plaintiff filed a request for findings of fact and conclusions of law, which the Court took under advisement and on June 10, 1931, found all facts as requested by plaintiff, including Nos. 9, 10, 12 to 17, 19 and 20, and granted the request of plaintiff for conclusions of law Nos. 4 (b) and 4 (c), which said findings of fact Nos. 9, 10, 12 to 17, 19 and 20, and conclusions of law Nos. 4 (b) and 4 (c) and the rulings thereon are as follows:

Findings of Fact.

"9. On April 23, 1921, and within 30 days after the discovery well was brought in, the partnership transferred to the Ohio Oil Company 120 acres of the 160 acres on which the well was located by the following instrument in writing (Exhibit N):

'State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me Sam W. Mason, a Notary Public duly commissioned and

sworn in and for said Parish and State, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of Shreveport, said Parish and State, who declared that for and in consideration of the sum and price hereinafter set forth, he has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company, a corporation organized under the laws of the State of Ohio, domiciled in the City of Findlay, County of Hancock, State of Ohio, herein appearing for the purpose of accepting this assignment through its agent and attorney in fact, O. D. Donnell, Vice-President, duly authorized and empowered hereto by a resolution of the Board of Directors of said Company, a certified copy of which is attached hereto, and by reference made part hereof, the following described property situated in the Parish of Claiborne,
306 State of Louisiana, and particularly described as follows, to-wit:

East half ($E\frac{1}{2}$) of Northwest quarter ($NW\frac{1}{4}$) and Southwest quarter ($SW\frac{1}{4}$) of Northwest quarter ($NW\frac{1}{4}$) of Section 14, Township 23 North, Range 8 West, containing one hundred twenty acres more or less.

To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigned.

To have and to hold unto the said The Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of three million dol-

lars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of the said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver unto said assignor, his heirs, executors and assigns, the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his he.rs or assigns.

It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman, his heirs and assigns, shall share in the profits derived from the manufacture of said product to the extent of an undivided one-eighth (1/8) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

The appearers further declared that it is agreed and understood by and between them that the deferred payments to be made out of the oil, as well as settlements for the one-eighth (1/8) excess royalty herein above stipulated, shall be made on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

In witness whereof, the said James E. Smitherman and the said The Ohio Oil Company, acting through its said agent and attorney in fact, have hereunto signed their names in the presence of me, Notary, and E. G. Palmer and Mrs. R. T. Layne, two competent witnesses, at my office in the City of Shreveport, in said Parish and State on this 23rd day of April, 1921.

JAMES E. SMITHERMAN,
THE OHIO OIL CO.,
By O. D. DONNELL,

Witnesses: Vice-President.
E. G. PALMER,
MRS. R. T. LAYNE.
SAM W. MASON,
307 Notary Public.'

On the execution of which, the said Ohio Oil Company paid to the partnership a bonus or advanced royalty of Three Million ($3,000,000.00) Dollars, and agreed to pay an additional bonus or advanced royalty of One Million ($1,000,000.00) Dollars out of 1/2 of of the first oil produced and saved from the premises sub-leased, and an excess or overriding royalty of one-eighth of the oil and gas produced and saved from the leased premises and reserved to sub-lessor the right to join with the sub-lessee in the manufacture of casing head gasoline from the wells drilled on said premises, and in connection therewith agreed with the partnership as follows: (Exhibits O and P).

'Memorandum of Agreement, made and entered into this 12th day of July, 1921, by and between James E. Smitherman of Shreveport, La., hereinafter referred to as Smitherman, and the Ohio Oil Company, an Ohio corporation, hereinafter referred to as the Ohio, Witnesseth:

Whereas: By the terms of certain assignments from James E. Smitherman to the Ohio Oil Company conveying to said Company certain interest in oil and gas lease in Claiborne Parish, State of Louisiana, and in the County of Columbia, State of Arkansas, said instruments of assignment being recorded in Book 45, page 392, records of Columbia County, Arkansas, and in Book 28, page 15 to 25 inc., of the conveyance records of Claiborne Parish, La., the Ohio Oil Company agreed to pay over and deliver to the said Smitherman the equal one-eighth (1/8) part of all oil produced and saved from the premises so assigned. Now, therefore, this agreement to provide for gathering, storing and disposing of such one-eighth interest. In consideration of the sum of one dollar each to the other paid, receipt of which is hereby acknowledged, and in consideration of the mutual covenants herein contained it is agreed as follows:

First: The Ohio shall have control of said Smitherman one-eighth interest, with the right to place in storage commingled with the Ohio's oil or any other oil that may be stored in such tanks from the Smitherman leases, for as long as it shall think wise, all or any part of said interest, and the right at any time to sell with the Ohio's portion of the oil, any part or all of such interest at the price the Ohio shall at the time be receiving for its oil run from the tank farm in the Haynesville, La., field, settlement for oil sold to be made on or before the 15th day of the month succeeding that in which the oil is so sold, such settlements to be made subject to any deductions that may be made by the Pipe Line Company at the time the oil is run.

In consideration whereof the Ohio agrees, upon the payment to it by said Smitherman of the sum of fifteen hundred dollars ($1,500.00) to convey to Smitherman

an undivided one-eighth (1/8) part of the interest acquired by it in and to the following described land: The Northwest quarter (NW¼) and the Northwest quarter (NW¼) of the Southwest quarter (SW¼) less 15 acres off of the South side of said last described tract, all in Section 13, Township 23 North, Range 8 West, Claiborne Parish, La., containing 185 acres, more or less, upon which are now being erected oil storage tanks, the Ohio reserving to itself however, the one one hundred and twenty-eighth (1/128) royalty interest acquired by it by deed of conveyance from Frank M. Taylor.

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Second: It is further agreed that Smitherman shall have and own an undivided one-eighth interest in all tanks erected on said land upon the payment to the Ohio of an equal one-eighth of the cost of all such tanks now on said land or to be erected thereon, payment to be made promptly upon receipt of bills from the Ohio.

Third: The Ohio agrees further that it will construct the necessary gathering lines at its own expense, convey the oil to storage tanks, and market the Smitherman one-eighth interest for a consideration of eight cents (8¢) per barrel payable on or before the 15th day of month following that during which the oil is run into the storage tanks.

Fourth: It is agreed further that Smitherman shall pay to the Ohio the one-eighth part of any charge that may be made by the Louisiana and Northwest Railroad on account of the construction and maintenance of a railroad siding on said tank farm and now being used for the transportation of tank material.

Fifth: Smitherman agrees to join with the Ohio in the execution of any division orders required to accom-

plish the sale of all or any part of the oil produced from the lands described in the assignments above referred to.

Sixth: It is further understood that the Ohio shall not be responsible for the loss of any such oil so placed in storage, by reason of evaporation or fire, or otherwise, except that if the Oil shall carry insurance on such oil Smitherman shall pay one-eighth of the cost of such insurance and be protected to the extent of his interest so insured.

In witness whereof the said James E. Smitherman has hereunto set his hand and the Ohio Oil Company has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereto affixed, the day and year first above written. This agreement shall be binding upon the heirs, successors and assigns of the parties hereto.

(Signed) JAMES E. SMITHERMAN.

Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Attest:
Witness:
(Signed) S. L. BEENE,
E. B. REDPATH.

309 State of Ohio,
County of Findlay.

Before me, the undersigned authority, personally came and appeared James E. Smitherman, of Shreve-

port, La., and the Ohio Oil Company appearing through J. C. Donnell, its President, and C. L. Fleming, its Secretary, who declared to me said Notary that they executed the above and foregoing agreement in writing for the purposes and considerations therein set forth and in the presence of the subscribing witnesses hereto.

In witness whereof, the said appearers have hereunto signed their names in the presence of me a Notary in the presence of two competent witnesses in my office in said County and State on the 12th day of July, 1921.

(Signed) JAMES E. SMITHERMAN,
THE OHIO OIL COMPANY,
By J. C. DONNELL, President,
C. L. FLEMING, Secretary.

Witnesses:
S. L. BEENE,
E. B. REDPATH.
W. R. HODGE, Notary Public.

My commission expires March 4, 1924.'

'The Ohio Oil Co.

Shreveport, La., April 23, 1921.

Mr. J. E. Smitherman,
Shreveport, Louisiana.

Dear Sir:

With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred twenty-eight oil, gas and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22 North, Ranges 7 and 8 West, and in Twp.

23 North, Ranges 6, 7 and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender or cancel all or any part of any one or all of said leases then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors.

Yours very truly,
THE OHIO OIL COMPANY,
By J. K. KERR,
JKK:C. Vice-President.'

Granted.

310 10. On April 21, 1921, and within thirty days after the discovery, the partnership transferred to the Gilliland Oil Company forty acres on which the discovery well was located for a payment in the nature of a bonus or advanced royalty of approximately six hundred thousand ($600,000) Dollars, and at the same time entered into a "working agreement" with said company. The transfer and working agreement being as follows: (Exhibits L and M).

'State of Louisiana,
Parish of Caddo.

Know all men by these presents, that personally came and appeared before me T. M. Milling, Notary Public in and for said Parish and State, duly commismissioned and sworn, personally came and appeared James E. Smitherman, a married man, whose wife's maiden name was Ina Thompson, a resident of the City of Shreveport, said Parish and State, who declared that for the consideration hereinafter set forth, he has

and does by these presents sell, assign, set over, transfer and deliver, without warranty, but with full subrogation of all rights and actions in warranty, unto the Gilliland Oil Company, a Corporation organized under the laws of the State of Delaware authorized to do business in the State of Louisiana, with offices in the City of Shreveport, herein appearing through its Vice-President, R. C. Gilliland, duly authorized hereto by Resolution of the Board of Directors, of said corporation, a certified copy of which is attached hereto, its successors and assigns.

An undivided one-half interest in and to that certain mineral lease executed by Mrs. Annie Taylor et al on March 3rd, 1919, in favor of J. E. Smitherman, filed for record on the 8th day of March, 1919, and recorded on the 30th day of April, 1919, in Book 10, folio 35, Conveyance records of Claiborne Parish, Louisiana, in so far as same covers and effects the Northwest quarter of the Northwest quarter (NW¼ of NW¼) of Section Fourteen (14), Township Twenty-three (23) North of Range Eight (8) West, containing forty acres more or less,

Together with a like interest in the oil well thereon known as Taylor Number Two (2), with all the machinery, appurtenances and attachments thereto belonging; Eight steel storage tanks having a total capacity of Seven thousand barrels together with the oil therein, and the oil in earthern storage heretofore produced by the well known as Taylor No. 2, whether situated on the above described property or not.

Also a like interest in and to the drilling well known as Taylor Number Four (4), subject however to the obligation of assignee to pay and discharge one-half of the cost and expenses of drilling said well, all situated in Claiborne Parish, Louisiana.

To have and to hold unto the said Purchasers, its successors and assigns, subject to the terms and conditions of said mineral leases.

The consideration for which this sale and assignment is made, is the sum and price of six hundred thousand ($600,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, and full
311 discharge and acquittance granted for same.

The said parties declared that it is understood between the parties to this agreement that all conditions between the parties hereto extend to their heirs, executors, administrators and assigns.

Thus done and passed at my office in said Parish of Caddo, in the presence of Sam W. Mason and E. G. Palmer competent witnesses on this 21st day of April, A. D. Nineteen Hundred and Twenty-one.

JAMES E. SMITHERMAN,
GILLILAND OIL CO.,
By R. C. GILLILAND, Vice-Pres.

Attest:
SAM W. MASON,
E. G. PALMER.

T. M. MILLING,
Notary Public in and for
Caddo Parish, Louisiana.'

'Working Agreement.

State of Louisiana,
Parish of Caddo.

Know all men by these presents that this agreement is made and entered into by and between James E. Smitherman, married to Ina Thompson, a resident of

Shreveport, said Parish and State, hereinafter designated as party of the first part, and the Gilliland Oil Company, a corporation organized under the laws of the State of Delaware, authorized to do business in the City of Shreveport, Caddo Parish, Louisiana, herein appearing through R. C. Gilliland, duly authorized and empowered hereto, all as will appear by resolution of the Board of Directors of the said corporation, attached hereto and by reference made a party hereof, hereinafter called party of the second part,

Witnesseth:

That for and in consideration of the sum and price of Seven hundred and fifty thousand dollars ($750,000.00) to be paid in cash and property as hereinafter set forth, party of the first part binds and obligates himself to sell, assign and set over unto the party of the second part, and party of the second part agrees to buy, without warranty, but with full subrogation of all rights and actions of warranty, unto said party of the second part, its successors and assigns, and for the particular consideration set forth, the following described property, to-wit:

First: An undivided one-half interest in and to the mineral leases covering

Northwest quarter (NW¼) of Northwest quarter (NW¼) of Section Fourteen (14), Township 23 North Range 8 West, and the South half (S½) of Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section Eleven (11), Township 23 North, Range 8 West, Claiborne Parish, Louisiana,

together with the oil well thereon known as Taylor No. 2, and all drilling wells and equipment, tankage, derricks, etc., situated upon said lease, to-
312 gether with all the oil produced from said well known as Taylor No. 2, whether situated

upon said property or not, for the consideration of the sum and price of Six hundred thousand dollars ($600,000.00).

Second: An undivided one-half interest in and to leases covering an amount of acreage checkerboarded throughout grantor's leases known as Haynesville acreage and situated in Township 23 North, Ranges Six (6), Seven (7), and Eight (8) West, Claiborne Parish, Louisiana, and in Township 20 South, Range 19 West, Columbia County, Arkansas, equal to approximately one-eighth (1/8) of the acreage owned by the said party of the first part in each and every section in which he owns leases in the said area, the total amount of acreage owned by him being approximately Twenty thousand (20,000) acres and the amount which he is transferring an undivided one-half (½) interest herein being Twenty-five hundred (2500) acres, more or less, for and in consideration of the sum and price of One hundred and fifty thousand dollars ($150,000.00), the said acreage being more particularly described and set out on a map thereof, reference to which is hereby made, and the said party of the first part agrees to accept as a part of the consideration to be paid by party of the second part for the property as above stated, at a valuation of Two hundred and fifty thousand dollars ($250,000.00), an undivided one-half interest in and to party of the second part's Tank Farm situated at Minden, Louisiana, together with all the tanks thereon, loading racks, machinery, pump stations, spur tracks, right of way, and equipment, piping, attachments and appurtenances thereto belonging, except eight (8) tanks, at present partially filled with oil, together with the ground upon which said eight tanks stand; the number of tanks herein transferred being guaranteed by party of the second part to be not less than fifteen (15) in number, with a total capacity of Seven hundred and fifty thousand (750,000) barrels;

And an undivided one-half interest in and to party of the second part's Six Inch Pipe Line known as "Number 2 line" and constructed from the said above described Tank Farm to its "Shaw-C" pump station in Section 25, Township 21 North, Range 8 West, in the Homer oil field, together with a like interest in the right of way and telephone line thereon constructed and a like interest in and to the pump station situated on said lease and constituting a part of the said pipe line, with all the buildings and machinery thereunto belonging and an undivided one-half (½) interest in and to a six inch pipe line and right of way therefor, and telephone lines and pump stations therefor, to be built and constructed from said "Shaw-C" leases in said Homer Field to the

Southwest quarter (SW¼) of Southwest quarter (SW¼) of Section 14, Township 23 North, Range 8 West,

at the entire expense and cost of party of the second part.

In selling the above described leases and in acquiring said above described pipe line and appurtenances thereto, it is agreed and understood that the said property shall be operated as a partnership property but that party of the second part shall have the control and supervision thereof, it being agreed and undersood, however, that party of the second
313 part shall confer with party of the first part, his agent or assigns, with reference to the general policy of drilling and exploiting the said above described leases and marketing and otherwise disposing of the said oil.

It is agreed and understood that if party of the second part does not desire to market the oil produced from the above described leases in due course,

that party of the first part shall have the right to sell his equal one-half (½) thereof from the loading rack or Tank Farm, as above stated, upon such terms and for such price as to him may seem fit, or to deliver a sufficient amount of said oil to pay party of the first part's portion of expense of exploiting said properties, to party of the second part on the basis and for the price that is paid by the Standard Oil Company Pipe Line at that time for a like grade and quality of oil currently produced and marketed from the Caddo Parish oil fields, it being agreed and understood that oil produced from Taylor No. 2 well is equal in grade and quality to Caddo 38 gravity; settlement for said oil to be made on or before the 15th day of the month succeeding that on which same is produced.

It is agreed and understood that party of the first part shall pay one-half (½) of all the expenses necessary and incident to exploiting, developing and producing oil and gas from said above described leases and for the marketing thereof as crude oil, at the loading rack or pipe line connection at the Tank Farm at Minden, Louisiana, together with the necessary expense and upkeep or operating the said pipe line, tank farm and other marketing facilities, together with a like proportion of all rentals, renewals and other expenses made necessary and incidental to keeping the said above described leases in full force and effect on or before the 15th day of the month succeeding that on which said expenses are incurred.

It is further agreed and understood that if party of the second part should desire to manufacture casing head gasoline, that all manufacturing plants made necessary for the purpose of manufacturing said casing head gasoline and all facilities for marketing same at Haynesville, Louisiana, shall be borne equally by the parties hereto and the profits derived therefrom sall likewise be shared equally by the parties hereto.

It is further agreed and understood that party of the second part shall have the right of ingress and egress in, on and over any and all leases now owned by the party of the first part in Claiborne Parish, Louisiana, for the purpose of building and constructing pipe lines, gathering pipe lines, pump stations, water lines and other facilities made necessary for the exploitation of the leases in and to which an undivided one-half (½) interest is herein transferred.

It is agreed and understood by and between the parties hereto that party of the first part shall bear no office or overhead expense made necessary by the above outlined operations for a period of two (2) years, but that the party of the first part shall lend such assistance and cooperation as is necessary and reasonable within his power in the way of securing right of way for a pipe line, assisting in clearing the titles of all defects and encumbrances and otherwise aiding in similar matters pertaining to said leases.

314 Party of the second part agrees to take over from the said James E. Smitherman his contract with Smitherman & McDonald, covering the drilling of the well known as Taylor No. 4, and agrees to carry out his contract with the said Smitherman & McDonald to the extent of two (2) additional wells on the basis of Twenty-five thousand dollars ($25,000.00) per well, turn-key jobs.

It is agreed and understood by and between the parties hereto that party of the second part shall pay over and deliver to the lessors or their assigns, of the premises hereinabove described, the stipulated royalty due to said lessors or their assigns, in accordance with the terms of the said leases on or before the 15th day of the month succeeding that during which the oil is removed from the premises.

It is agreed and understood that party of the second part shall begin the construction for the extension of its pipe line from "Shaw-C" lease to the Haynesville field on April 19, 1921, and shall prosecute the building thereof with reasonable diligence to its completion, for the purpose of taking oil; and party of the second part guarantees it shall be completed not later than May 5th, 1921.

It is also agreed and understood by and between the parties hereto that the State, parish and local taxes for the year 1921 upon said pipe line, tank farm and appurtenances thereto, shall be paid in proportion of one-fourth (¼) by party of the first part and three-fourths (¾) by party of the second part.

It is also agreed and understood that as a part and parcel of this transfer that party of the first part will assign to party of the second part his rights to one-half of all water and water rights acquired by him from S. T. Hunt of Haynesville, Louisiana, on property situated in Sections 9 and 16, Township 23 North, Range 8 West, as per agreement of record in the Conveyance Records of Claiborne Parish, Louisiana.

In witness whereof the parties hereto have hereunto signed their names in duplicate in the presence of E. G. Palmer and Thos. M. Milling, two competent witnesses, on this 18th day of April, A. D. 1921.

(Signed) JAMES E. SMITHERMAN,
GILLILAND OIL COMPANY, INC.,
By R. C. GILLILAND.

Witnesses:
(Signed) E. G. PALMER,
T. M. MILLING.

Shreveport, La., June 27th, 1921.

The Foster Oil Company of Tulsa, Oklahoma, having purchased all of the property in Claiborne Parish and Webster Parish, Louisiana, lately owned by Gilliland Oil Company of Tulsa, Oklahoma, acquired from James E. Smitherman of Shreveport, La., and are now operating same with the six inch pipe line, pump stations, etc., from the Guy Taylor lease to Minden Tank Farm, Minden, La.

It is agreed and understood by and between the Foster Oil Company and James E. Smitherman that said property shall be owned and operated under the terms of the above and foregoing working agreement from and after June 22nd, 1921, at 8:00 o'clock A. M.

FOSTER OIL COMPANY,
By J. B. FOSTER, Pres.,
JAMES E. SMITHERMAN.

Witnesses:
E. G. PALMER,
JOHN W. BLUE.

315 State of Louisiana,
Parish of Caddo.

Know all men by these presents, that before me the undersigned Notary Public, duly commissioned and sworn, in and for said Parish and State personally came and appeared E. G. Palmer, to me well known, who being by me first duly sworn, did depose and say:

That he was one of the witnesses to the signatures of James E. Smitherman and Gilliland Oil Company, by R. C. Gilliland, signed on April 18th, 1921;

That he saw the said parties sign the said contract in his presence and in the presence of T. M. Milling, the other subscribing witness thereto, on the date and for the purposes and consideration therein set forth.

Affiant further stated that he was one of the witnesses to the supplemental agreement hereinabove written, dated June 27, 1921, and signed by Foster Oil Company, by J. B. Foster, President, and James E. Smitherman.

That the said supplemental contract and agreement was signed in his presence and in the presence of John W. Blue, the other subscribing witness thereto, all for the purposes and consideration therein set forth.

(Signed) E. G. PALMER.

Sworn to and subscribed before me, Notary, on this 28th day of June, 1921.

(Signed) SAM W. MASON,
Notary Public."

Granted.

"12. That it was the intention of the partnership and of the Ohio Oil Company by said transfers to sub-lease the acreage covered.

Granted.

13. That the partnership received therefor from the transfers aforesaid the following:

From the Ohio Oil Company—	
(a) Bonus	$3,000,000.00
(b) Right to receive out of ½ first oil, reduced to present worth	900,000.00
(c) 1/8 excess or over-riding royalty, reduced to present worth	1,300,000.00
	$5,200,000.00

From the Gilliland Oil Co.—		
Bonus	$585,750.00	
7/16 interest retained reduced to present worth ..	585,750.00	
	$1,171,500.00	
Aggregate		$6,371,500.00

Granted.

14. The fair value of the property on which the discovery well was brought in, at date of discovery or within thirty days thereafter, was represented by the cash and its equivalent received by the partnership and the value of the interest retained by the partnership aggregating Six million, three hundred seventy-one thousand, five hundred ($6,371,500) Dollars, which was the fair market value of the property on the date of discovery and within thirty days thereafter; the fair market value of the property affected by the transfer to the Ohio Oil Company being $5,200,000.00 and of that affected by the Gilliland transfer being $1,-171,500.00.

Granted.

15. The royalties expected to be received, without reducing to present worth, are as follows:

On transfer to Ohio Oil Co.	$1,625,000
On transfer to Gilliland Oil Co.	732,187

Granted.

16. That the cost of the well, being approximately $25,000, the fair market value of the property at date of discovery or within 30 days thereafter was disproportionate to cost.

Granted.

17. The total area, up to the date of discovery, being developed solely by the partnership, was not acquired as a result of the purchase of a proven tract or lease.

Granted.

19. That on the return so filed by the said partnership for the years 1921 and 1922, in determining the net income to be accounted for by the partners, there was deducted from the gross income, among other items, the bonus moneys or advanced royalties paid by the said Ohio Oil Company and the Gilliland Oil Company during said years on account of the said above described transfers.

Granted.

20. That subsequent to the filing of the aforesaid partnership returns, the Commissioner of Internal Revenue upon an audit of same, disallowed as deductions the amounts of Four million, twenty-three thousand, nine hundred forty-eight and 56/100 ($4,023,948.56) Dollars and Five hundred seventy-six thousand, fifty-one and 44/100 ($576,051.44) Dollars, representing depletion sustained by bonuses, or advanced royalties for the years 1921 and 1922, respectively, thereby increasing the net income of the partnership to be accounted for by members.

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That said disallowance was based on the theory that the conveyances made by the partnership to the Ohio Oil Company and Gilliland Oil Company, as aforesaid, constituted sales and not sub-leases. The audit letters being filed herein as exhibit "C"."

Granted.

Conclusions of Law.

"4. With respect to the Geo. O. Baird partnership, the conclusions of law requested to be determined are:

(b) That in the event the $350,000.00 was not a loan, then it was not taxable income to plaintiff and his associates, because it did not go to them, but to Munhall (Flannery's assignee), to whom it was paid in satisfaction of his rights under the lease.

Granted.

(c) That the sum of $350,000.00 paid to Flannery's assignee under the judgment resolving the sale to Flannery was a condition precedent to repossession of the property."

Granted.

To which rulings of the Court in granting plaintiff's request for findings of fact Nos. 9, 10, 12 to 17, 19 and 20, and conclusions of law Nos. 4(b) and 4(c), defendant then and there excepted and reserved this bill of exceptions.

The foregoing Bill of Exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS, Judge.

Filed Sept. 15, 1931.

318 BILL OF EXCEPTIONS No. 2.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it known, that after this case was closed, counsel for defendant on July 3, 1930, filed for and on

behalf of defendant a request for findings of fact and conclusions of law, which request for findings of fact and conclusions of law is made a part hereof by reference, which the Court took under advisement, and on June 10, 1931, the Court denied defendant's request for findings of fact Nos. 10 to 18, inclusive, and conclusions of law Nos. 3 and 4, and the second sentence of No. 5 which request for findings of fact and conclusions of law and rulings thereon are as follows:

Findings of Fact.

"10. In the year 1919, George O. Baird, acting for himself and associates, as hereinafter set out, acquired a certain oil and gas lease on a then unproven area consisting of about 51 acres and known as the "Langston Lease" in said Claiborne Parish. The lease was taken for the use and benefit of the following named persons in the proportion here set out, to-wit:

(a) The George O. Baird Partnership, composed of George O. Baird, E. G. Palmer, R. T. Layne, J. A. Thigpen and S. L. Herold, equally, and undivided one-half interest; or an undivided one-tenth interest each.

(b) Mrs. Elias Goldstein and Mrs. H. C. Walker, Jr., an undivided one-fourth interest; or an undivided one-eighth interest each.

(c) Mrs. J. A. Thigpen and Mrs. S. L. Herold, an undivided one-fourth interest; or an undivided one-eighth interest each.

11. All of the parties above named were at the time of their acquisition of their respective interests in said lease and throughout the years in controversy, to-wit:

1919, 1920, 1921 and 1922, citizens of and domiciled in the State of Louisiana and were married, so that each such interest was community property vesting title in one-half of the interest so acquired in the husband and one-half in the wife. R. T. Layne died on March 20, 1920, leaving as his sole surviving heir, Mrs. R. T. Layne, who became a member of the George
319 O. Baird partnership by virtue of the inheritance of her husband's one-half of the community estate, and under the community property laws of Louisiana, as owner of the other held.

12. Baird and his associates above named drilled a well on the said unproven tract, which resulted in the discovery of oil on August 23rd, 1919. Their rights as discoverers to a revaluation, based on discovery under the provisions of the Revenue Law, were duly asserted and have been formally recognized by the Commissioner; the discovery revaluation having been fixed by the Commissioner at $1,011,397.67 and the unit for depletion purposes having been definitely found and adjudged by the Commissioner to be $1.3859 per barrel.

13. On December 10th, 1919, George O. Baird, with the consent of and representing all his associates as well as himself, entered into a contract with J. Rogers Flannery, a copy of which contract was received in evidence, marked Exhibit W, and by this reference is made a part hereof. Said contract provided in part as follows:

'This agreement, made and executed this 10th day of December, A. D. 1919, by and between George O. Baird, a resident of Caddo Parish, Louisiana, and J. Rogers Flannery, of Pittsburgh, Pennsylvania,

Witnesseth:

'1. The said Baird has agreed to sell with full warranty of title, and the said Flannery has agreed to buy, on the terms, conditions and considerations hereinafter set out, the following described property situated in the Parish of Claiborne, State of Louisiana, to-wit: (Here follows description of George O. Baird-Langston Lease).

'2. The price of the said sale is the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.-00), which the said Flannery binds and obligates himself to pay in the manner and on the terms here set out, to-wit:

'3. With the signing of this act the said Flannery has paid to the said Baird the sum of Five Hundred Thousand Dollars ($500,000.00), the receipt whereof is hereby acknowledged, and further binds and obligates himself to pay on or before the eighth day of February, 1920, to the said Baird the further sum of Three Hundred Thousand Dollars ($300,000.00).

'Upon the failure of the said Flannery to make the said payment on or before the date above specified, the said Baird shall have the right and option after giving to the said Flannery fifteen days' notice in writing of his intention so to do, to declare the forfeiture of this contract and to retain the sums already paid, and any retention of said sums shall be in full liquidation and settlement of damages and in lieu of any other or further damages whatsoever which the said Baird, his heirs or assigns, might claim, and operate as a release and discharge of said Flannery, his heirs and assigns, of and from any and all liability whatsoever incurred under or by virtue hereof.

'4. When the said Flannery shall have paid to the said Baird under the aforesaid terms the sum of Eight

Hundred Thousand Dollars ($800,000.00), then the said Baird shall execute to the said Flannery a good and sufficient deed to the property herein sold, taking the notes of the said Flannery for the remainder of the purchase price, five (5) of the said notes to
320 be in the sum of Three Hundred Thousand Dollars ($300,000.00) each, due on or before thirty (30), sixty (60), ninety (90), one hundred twenty (120) and one hundred fifty (150) days, respectively, after date of said deed, and one (1) note for the sum of Two Hundred Thousand Dollars ($200,000.00), due on or before one hundred eighty (180) days after date of execution of the said deed, said notes bearing five (5) per centum per annum interest from date; said notes to be secured by said property and the production thereof, subject, however, to a provision that, so long as the said notes are being promptly paid at maturity, no part of production from said wells shall be withheld from the purchaser on account of the said security. Said notes also to be subject to the right of payment before maturity, with interest to date of payment, as hereinafter provided.

'5. At any time after January 1, 1920, the said Flannery shall have the right to make payment of the entire unpaid balance of the said purchase price, with such interest only as may have accrued to date of payment, and contemporaneously with such payment to receive from the said Baird, and the said Baird shall deliver, a good and sufficient deed for the property herein sold, or, if said deed has already been delivered under the provisions of the preceding paragraph, then the said Baird shall forthwith deliver and return to the said Flannery any and all promissory notes given under the said preceding paragraph for any part of the said purchase price.

'6. Upon payment of the said sum of Eight Hundred Thousand Dollars ($800,000.00) and the execu-

tion of the deed and notes as aforesaid, as provided in paragraph 4, or upon payment of the entire unpaid balance of the said purchase price as provided in paragraph 5, the said Flannery shall be entitled to credit for the proceeds of all the oil run and sold from the property from and after 7:00 A. M. November 8, 1919, and shall pay to the said Baird all sums expended by him for or on account of the development of the said properties from and after said date."

Under this contract, Flannery paid, on December 10, 1919, as therein recited, the sum of $500,000.00. Part of said sum was used by Baird to pay certain obligations of Flannery's; the balance after such payments, amounting to $350,000.00, being the net sum paid on that date by Flannery under the terms of the contract. As authorized by the agreement, Baird retained for his security the possession of the property and continued its operations.

14. On December 30th, 1920, George O. Baird, F. G. Palmer, J. A. Thigpen, and S. L. Herold purch[illegible]d from Mrs. Elias Goldstein and Mrs. H. C. W[illegible]ker, Jr., the whole of their interest in the aforesaid Langston lease, which lease (like that of all the other parties named except Baird) had been represented by written instruments signed by Baird but not recorded.

15. Flannery failed to make any payments other than his original cash payment, or otherwise to comply with his obligation under the contract, "Exhibit W". Accordingly, on January 11th, 1921, Baird instituted a suit in the Third Judicial District Court of Louisiana, in and for the Parish of Claiborne, demanding a resolution of the contract for non-performance of its conditions. The suit was contested
321 by Flannery; the case was put at issue; trial was had and there was final judgment on the

9th day of November, 1921, decreeing a restoration of the status quo before the contract, including the return by Baird to Flannery of the $350,000.00 which he, Baird, had received from Flannery on December 10th, 1919. A certified copy of the proceedings in the above case, including the pleadings and the judgment, was received in evidence, marked Exhibit X and by this reference made a part hereof the same as if set out in full.

16. As shown by the record referred to as Exhibit X, Flannery had, subsequent to the suit but prior to judgment, assigned all his rights under the aforesaid contract, Exhibit W, to one John Munhall, Jr., so that the judgment was finally rendered was against Munhall as assignee of Flannery.

17. On November 16, 1921, George O. Baird, acting for himself and his then co-owners, made an agreement with the Gulf Refining Company of Louisiana, which was embodied in the written contract, which was received in evidence, as Exhibit Y. Said contract is as follows:

'This agreement between George O. Baird, husband of Estella Mitchell, a resident of Caddo Parish, Louisiana; and the Gulf Refining Company of Louisiana, a corporation under the laws of the State of Louisiana, and domiciled at Orleans Parish, witnesseth:

'1. That said Baird is the owner of an oil and gas lease covering all of the S½ of the NE¼ of Section 24, Township 21 North, Range 8 West, less the West 30 acres thereof; and less also about one (1) acre in a square in the southwest corner of said described property, as to which one acre, however, the said Baird is the owner of an undivided one-half (½) interest, the Gulf Refining Company of Louisiana being the

owner of the other undivided one-half interest in the lease covering the said one acre; the lease above referred to including the eleven (11) oil wells on the said property, all the equipment thereto annexed and attached, together with the interest of the said Baird in the one well located on said one acre tract hereinabove referred to.

'2. For and in consideration of the obligations and agreements hereinafter set out, the Gulf Refining Company of Louisiana has obligated itself and does hereby agree to take possession of the said lease, to equip same properly at its own expense, and to operate such wells diligently for the production of oil, and to maintain the said production as long as oil may be produced therefrom in paying quantities; all such equipment and operation to be at the entire expense of the Gulf Refining Company of Louisiana and free from any expense whatsoever to the said Baird. And all taxes of every character legally assessed and charged against said lease, including all severance tax on the production therefrom, except as to the royalty interests, shall be paid by the Gulf Refining Company of Louisiana.

'3. For and in consideration of the obligation of the Gulf Refining Company of Louisiana to equip and to operate said property free of expense to him, the said George O. Baird agrees that the Gulf Refining Company of Louisiana, may retain from the production of the said property, forty per cent (40%) of the oil produced therefrom, the agreement between the parties being that out of the said 40 per cent so retained by the Gulf Refining Company of Louisiana, that company shall deliver the royalty of one-eighth (1/8th) of the oil, as provided for in the lease covering said property, and shall in addition deliver to the said Baird for a term of three (3) years, beginning the 1st day of November, 1921, one-twenty-fourth (1/24th)

of all the oil that may be saved from that produced from the said property, the said delivery to be made in the same manner in which the royalty is to be delivered to the lessors, under the provisions of the original lease.

322 '4. In consideration of this obligation and agreement, as hereinabove set out, the Gulf Refining Company of Louisiana shall have, however, the right to all of the gas, including casing-head gas, extracted from the wells on the said property, and all profits therefrom accruing, subject to such contracts as it may be able to secure from the lessors of the said property, and free from any obligation to account to the said Baird for any of the said gas or any of the profits derived from its manufacture or sale.

'5. The Gulf Refining Company of Louisiana has this day loaned to the said George O. Baird, the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, on the sole security of the said lease, without any personal liability. And, in order to secure the repayment of the said sum within thirty (30) months from this date, the said Baird has, and does by these presents, mortgage and hypothecate unto the said Gulf Refining Company of Louisiana all of his right, title and interest thereto, and, in addition to further secure said obligation, pledges unto the said Gulf Refining Company of Louisiana, all of the oil that may be saved from that produced from the said leased lands, after the delivery of the royalty of one-eighth (1/8th) to the lessors, and the one-twenty-fourth (1/24th) to the said Baird, as hereinabove provided.

'It is distinctly agreed and understood, however, that the Gulf Refining Company of Louisiana will as hereinabove set out deliver to the said Baird sixty per cent (60%) of the oil produced from the said

property, notwithstanding the said mortgage and pledge and free from any claim thereunder, until the said Baird shall have received from the said production sufficient oil to yield him, at the market price prevailing on the date of delivery, and at which price he will be able to sell said oil, the sum of Three Hundred and Twenty-five Thousand ($325,000.00) Dollars, from the 60 per cent (60%) of the oil produced from the said property, which the said Gulf Refining Company of Louisiana has under this agreement obligated itself to deliver.

'After the said Baird shall have received from the 60 per cent of the oil so delivered to him the sum of $325,000.00, or after the expiration of the 30 months from this date, if the said Baird shall not have received such amount from the said production within that time, then the Gulf Refining Company of Louisiana shall have the right to apply such 60 percent of the oil, or the proceeds thereof, to the repayment of the said loan until same shall have been paid in full, without interest.

'6. In consideration of the obligations and agreements hereinabove entered into on the part of the Gulf Refining Company of Louisiana, the said Baird now agreed and obligates himself that whenever there shall have been produced from the said property by the Gulf Refining Company of Louisiana such quantity of oil that the 60 per cent which the said Gulf Refining Company of Louisiana has agreed herein to deliver to him, shall have produced the sum of Six Hundred and Seventy-five Thousand ($675,000.00) Dollars (the first $325,000.00) of the proceeds of the sale of such oil to be retained by Baird as above provided, and the remaining $350,000.00 to be retained by said Company, to be applied by it to the liquidation of the indebtedness above set out, that he will then sell,

assign, convey, and deliver to the said Gulf Refining Company of Louisiana the entirety of the said mineral lease hereinabove referred to and forming
323 the subject matter of this contract, for the consideration of the obligation upon the part of the Gulf Refining Company of Louisiana to continue to operate said property for the production of oil for such length of time as it may be able to produce oil therefrom in paying quantities, and to deliver to him, or his transferees, the one-twenty-fourth (1/24th) royalty out of the oil, as hereinabove provided, until the expiration of three (3) years from this date, and a royalty of one-thirty-second (1/32nd) of all the oil that may be saved from that produced, after said date, and as long thereafter as oil may be produced from the said property in paying quantities.

'7. As further security to the Gulf Refining Company of Louisiana for the performance of the obligation to sell as set out in the last preceding paragraph, the said Baird has this day executed an assignment in favor of said company of his entire interest in the said lease, which said assignment he agrees to deposit in escrow with such depositary as may be mutually agreed upon by the parties, to be retained by said trustee and to be delivered to the Gulf Refining Company of Louisiana, when it shall have complied with the obligations above set out and made a consideration of said assignment; said assignment so delivered in escrow shall moreover be considered between the parties thereto as a further security for the pledge and mortgage hereinabove stipulated.

'In witness of which, this agreement has this day been executed in duplicate, the said Gulf Refining Company of Louisiana being represented therein by its Third Vice-President, C. R. Minor, being herein authorized, and this agreement being executed as of and effective from seven-thirty o'clock A. M., November 1, 1921. Shreveport, La., Nov. 16th, 1921.

The sum of $350,000.00 therein mentioned was not paid to Baird and/or his co-owners, but at their direction and for their benefit was paid by the Gulf Refining Company of Louisiana to John Munhall, Jr., through the Mellon National Bank of Pittsburgh, Pennsylvania, in compliance with the terms of the judgment which has heretofore been filed in evidence as part of Exhibit X.

18. As provided in the contract filed and marked Exhibit Y, the Gulf Refining Company of Louisiana took physical possession of the property, and as therein provided a deed was executed by Baird and deposited in escrow with an escrow agent agreed upon by both parties, to be delivered under the conditions recited in Exhibit Y. The deed remained in the hands of the escrow agent under the terms of the escrow agreement throughout the remainder of the year 1921 and through all of 1922, and until some time in the year 1927, when same was delivered by the escrow agent to the Gulf Refining Company of Louisiana."

Requested Findings of Fact 10 to 18 inclusive are denied and the facts are found to be as stipulated in the record.

Conclusions of Law.

3. "The $350,000.00 paid by the Gulf Refining Company to Flannery's assigns for the benefit and at the direction of the Baird partnership was properly included in the income of said partnership for 1921."

Denied.

324 "4. The evidence does not show the fair market value of the property with respect to which depletion is claimed.

Denied.

"5. No further deductions from gross income are allowable in either 1921 or 1922 on account of depletion. (If the instruments in question were acts of sale, it is apparent that the transferors had parted with all their interest in the depletable property and are not, therefore, entitled to depletion)".

First sentence granted, second denied.

To which action of the Court in denying said request for findings of fact and conclusions of law, and in not granting same, defendant then and there excepted and reserved this Bill of Exceptions.

The foregoing Bill of Exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS, Judge.

325 BILL OF EXCEPTIONS No. 3.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it remembered, that after this case was closed, counsel for plaintiff on June 10, 1931, for and on behalf of plaintiff, filed a request for the Court to grant and determine additional conclusions of law, which said document is made a part hereof by reference, whereupon the Court granted No. 9 of said request for additional conclusions of law, which request with ruling thereon is as follows:

"9. That the transfer from Smitherman to Ohio Oil Company, aforesaid, was a Louisiana contract governed by the law of Louisiana, as set forth in the Revised

Civil Code and jurisprudence of Louisiana and is not governed by the common law authorities or the jurisprudence of other states."

Granted.

To which action of the Court in granting said request for conclusions of law the defendant then and there excepted and reserves this bill of exceptions.

The foregoing bill of exception is hereby settled and allowed this September 15, 1931.

BEN C. DAWKINS,
Judge.

326 BILL OF EXCEPTION No. 4.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it remembered, that on July 16, 1930, after the conclusions of the trial hereof, plaintiff filed a motion for judgment in his favor as prayed for, said motion being made part hereof by reference, which the Court took under advisement and on June 10, 1931, the Court denied in part plaintiff's said motion for judgment in this language, to-wit:

"Denied in part. See written opinion."

To which ruling of the Court on said motion filed by the plaintiff, insofar as the same granted plaintiff judgment as prayed for, defendant then and there excepted and reserved this bill of exception.

The foregoing bill of exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS,
Judge.

327 BILL OF EXCEPTIONS No. 5.

(Title Omitted.)

Be it remembered, that on May 26, 1930, defendant filed a motion for judgment in his favor after the trial hereof, the said motion being made a part hereof by reference, which the Court took under advisement, and on June 10, 1931, denied in part defendant's said motion for judgment in the following language, to-wit:

"Denied in part. See written opinion."

To which ruling on said motion for judgment in his favor filed by defendant, insofar as the same was denied, and insofar as the same denied defendant judgment in his favor as prayed for, defendant then and there excepted and reserved this bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS,
Judge.

Filed Sept. 15, 1931.

328 BILL OF EXCEPTIONS No. 6.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it remembered, that on June 19, 1931, after the close of this case, plaintiff filed a motion proposing

computation of judgment and tender of form of judgment in accordance therewith, said motion and form of judgment tendered being made a part hereof by reference, which said motion and tender of judgment in accordance therewith was objected to by defendant on the following grounds, to-wit:

"For the reason that the computation of tax for the year 1922 attached thereto is not in conformity with the opinion rendered in this case on February 25, 1931, and for the further reason that a sufficient claim for refund for the year 1922 has not been filed as provided by Section 3228 of the Revised Statutes, and consequently under Section 3226 of the Revised Statutes this Court lacks jurisdiction to grant judgment for the recovery of any income taxes for the year 1922 resulting from the extinguishment of the remaining undepleted costs of the lease and the remaining depreciable costs of the property thereon."

Whereupon, on June 19, 1931, the Court overruled said objection of the defendant and allowed the said motion to be filed, approved the computation of judgment and signed and entered judgment in accordance therewith, to which ruling of the Court defendant then and there excepted and reserved the right to file this formal bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS,
Judge.

329 BILL OF EXCEPTIONS No. 7.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it remembered, that on June 19, 1931, after the close of this case, defendant tendered and filed a form

of judgment to be entered herein with computation of the said judgment attached thereto, which said document is made a part hereof by reference, and requested the Court to approve said computation of judgment, and to sign and enter judgment in accordance therewith, which the Court refused to sign and approve, and to which refusal and ruling on the part of the Court defendant excepted and reserved this bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS,
Judge.

330 BILL OF EXCEPTIONS No. 8.

Filed Sept. 15, 1931.

(Title Omitted.)

Be it remembered, that after this case was closed, counsel for defendant on September 9th, 1931, for and on behalf of defendant, filed a request for additional special findings of fact and conclusions of law, which request for additional special findings of fact and conclusions of law and rulings thereon are made a part hereof by reference, whereupon the Court granted the special findings of fact Nos. I, II, III, IV, V, VI. and VII, as requested, by defendant, and denied defendant's request for conclusion of law No. I, which requested conclusion of law and ruling thereon is as follows:

"I. That claims for refund for the year 1922 relate to depletion and nowhere in said claims did plaintiff request the Commissioner of Internal Revenue to deduct from, or offset against, the oil payments received in connection with the Langston Lease, that part of the

cost of said lease remaining unextinguished at the end of 1921; that said claims are insufficient and are based upon other and different grounds than a right to charge against the oil payments received in the year 1922, any part of the original cost of the capital investment in said Langston Lease; that said claims for refund for the year 1922 are insufficient within the meaning of Section 3226 of the Revised Statutes and even if plaintiff is entitled to any adjustment in income and a resulting reduction in tax liability, plaintiff may not recover as to said year because of the insufficiency of the claims."

"Denied. Defendant excepts."

331 To which action of the Court in denying said special request for conclusions of law, and in not granting the same, defendant then and there excepted and reserved this bill of exceptions.

The foregoing bill of exceptions is hereby settled and allowed, this September 15, 1931.

BEN C. DAWKINS,
Judge.

---

332 The United States of America.

District Court of the United States, Western District of Louisiana.

The President of the United States of America,

To E. G. Palmer, Shreveport, Louisiana, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of New Or-

leans, Louisiana, on the thirtieth day from the date hereof, pursuant to a petition, order of appeal and assignment of errors filed in the Office of the Clerk of the District Court of the United States for the Fifth Circuit and the Western District of Louisiana, wherein Mrs. Agnes B. McGrawl Bender, individually, as the surviving widow in community, and for and on behalf of her minor daughter, Hattie French Bender, and Marlin O. Bender, are defendants and appellants, and you are plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the said Mrs. Agnes B. McGrawl Bender, individually, as the surviving widow in community, and for and on behalf of her minor daughter, Hattie French Bender, and Marlin O. Bender, constituting the surviving spouse and legal representatives of Jacob O. Bender, deceased, as in said petition, order of appeal and assignment of errors mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States of America, at the City of Shreveport, Louisiana, this 15th day of September, in the year of our Lord, one thousand nine hundred and thirty-one and of the Independence of the United States of America, the one hundred and fifty-sixth year.

BEN C. DAWKINS,
Judge.

Service of copy of the foregoing citation is hereby acknowledged. Shreveport, Louisiana, September 30th, 1931.

JOHN H. TUCKER, JR.,
Attorney for the Plaintiff,
E. G. Palmer.

Filed Sept. 30, 1931.

333 Filed Oct. 14, 1931.

(Title Omitted.)

On motion of Mrs. Agnes B. McGrawl Bender, individually, and on behalf of her minor daughter, Hattie French Bender, and Marlin O. Bender, herein represented by their attorney, Philip H. Mecom, United States Attorney for the Western District of Louisiana, and on suggesting that the Clerk of the United States District Court has advised that it will be impossible for him to complete the transcript of appeal in this case within time to file it on or before October 15th, 1931, the return day thereof on the appeal taken by the defendants, and on further suggesting that the plaintiff, who has also appealed in this case, has heretofore been granted an extension of 90 days in which to file a transcript, which will expire on October 27th, 1931.

It is ordered that an extension of 12 days time, expiring October 27th, 1931, be and is hereby granted to the defendants and appellants for the purpose of completing and filing the transcript of record in this case, and that the return day of appeal be and it is hereby extended to October 27th, 1931.

Atlanta, Ga., October 12th, 1931.

(Signed) N. P. BRYAN,
Judge.

334 CLERK'S CERTIFICATE.

I, W. B. LEE, Clerk of the District Court of the United States for the Western District of Louisiana, Fifth Circuit, do hereby certify that the foregoing three hundred and thirty-two (332) pages contain and form a full, true, correct and complete transcript of the record, assignment of errors and all proceedings had in a cause entitled E. G. Palmer versus Jacob O. Bender, Individually and as Collector of Internal Revenue for the District of Louisiana, No. 1904 on the Law Docket of said Court, as fully as the same remains on file and of record in my office at Shreveport, Louisiana, the said transcript having been prepared in accordance with praecipes filed by counsel in said cause, copies of which accompany this transcript.

Witness my official hand and the seal of this Court at the City of Shreveport, Louisiana, on this the 14th day of October, A. D. 1931.

W. B. LEE, Clerk,
By MINA E. HOLT,
(Seal) Deputy Clerk, U. S. Dist. Court, Western District of Louisiana.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

E. G. PALMER

versus

JACOB O. BENDER, Individually and as Collector of Internal Revenue for the District of Louisiana,

and

Mrs. AGNES B. McGRAWL BENDER, Individually, as the Surviving Widow in Community, etc., et al.

versus

E. G. PALMER

ORDER OF SUBSTITUTION—December 18, 1931

The death of Jacob O. Bender, original defendant and appellee in this cause in the appeal of the plaintiff herein, having been suggested by the administratrix of the estate of the said Jacob O. Bender, deceased, late Collector of Internal Revenue for the District of Louisiana, and the said administratrix having voluntarily appeared herein and requested that she be substituted as appellee in place of the said Jacob O. Bender, deceased; and also substituted as appellant in place of Mrs. Agnes B. McGrawl Bender, individually, and the surviving widow in community, and for and on behalf of her minor daughter, Hattie French Bender, and in place of Marlin O. Bender, a major, legal representatives of Jacob O. Bender, deceased, on consideration whereof and in pursuance of said suggestion of death and request of said administratrix,

It is now ordered that Mrs. Agnes B. McGrawl Bender, administratrix of the estate of Jacob O. Bender, late Collector of Internal Revenue for the District of Louisiana, be and she is hereby substituted as appellee in the place and stead of Jacob O. Bender, deceased, and also substituted as appellant in place of Mrs. Agnes B. McGrawl Bender, individually, and the surviving widow in community, and for and on behalf of her minor daughter, Hattie French Bender, and in place of Marlin O. Bender, a major, legal representatives of Jacob O. Bender, deceased; and that this

cause now proceed from henceforth in the name of said substituted appellee and appellant.

Minute entry of argument and submission, February 29, 1932, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6409

E. G. PALMER, Appellant,

versus

JACOB O. BENDER, Individually and as Collector of Internal Revenue for the District of Louisiana, Appellee

and

MRS. AGNES B. McGRAWL BENDER, Individually, as the Surviving Widow in Community, etc., et al., Appellants,

versus

E. G. PALMER, Appellee

Appeals from the District Court of the United States for the Western District of Louisiana

(March 26, 1932)

Before Bryan, Sibley and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 26, 1932

BRYAN, Circuit Judge:

This is an appeal and a cross appeal from a judgment of the district court in part denying and in part allowing recovery of amounts assessed by the Commissioner of Internal Revenue as deficiencies and paid by appellant under protest upon net income which he received from two oil and gas leases in the years 1921 and 1922, as a member of each

of two partnerships, known as the Smitherman and Baird partnerships.

The questions presented have heretofore been considered upon an identical state of facts and decided by this court, upon petitions of other members of the Smitherman and Baird partnerships to review decisions of the Board of Tax Appeals, in the cases of Waller v. Commissioner, 40 F. (2) 892, and Herold v. Commissioner, 42 F. (2) 942. The judgment of the district court in this case, following our decisions in those cases, rejected appellant's claims that he was entitled, under § 214 (a) (10) of the Revenue Act of 1921, 42 Stat. 241, to deductions from his net income during the years involved for depletion based on the fair market value of either of the two leases at the date of the discovery of oil, and held that he was liable for all the deficiencies assessed against him by the Commissioner of Internal Revenue except for a deficiency assessment based upon the sum of $350,000, which was paid in 1921 by the Gulf Refining Co. in compliance with a condition of a judgment annulling Baird's contract with Flannery.

The above cited section of the 1921 Revenue Act provides that in computing net incomes derived from oil and gas wells a reasonable allowance shall be made for depletion where the fair market value of the property is materially disproportionate to the cost, the depletion allowed to be based upon such value at the date of discovery or within 30 days thereafter, and to be equitably apportioned between the lessor and the lessee. Section 218a of the same revenue act makes each member of a partnership liable for income taxes upon his distributive share. Congress, which was at liberty to withhold the allowance altogether or grant it upon such terms as it chose to impose, has allowed for depletion of oil and gas wells what was really a loss or conversion of capital, just as it has made an allowance for exhaustion of property used in trade or business. § 214 (a) (8). In Lynch v. Alworth-Stephens Co., 267 U. S. 364, the Supreme Court held that an allowance for exhaustion of ore deposits inured to the benefit of every one whose property right and interest in the mine had been depleted. And the same principle was applied to oil and gas wells by this court in Pugh v. Commissioner, 49 F. (2) 76.

Upon a sale of his oil and gas lease a taxpayer ceases to be entitled to deductions based upon discovery value, for

future depletion of such property is not his loss. If therefore, as we have held, the Smitherman and Baird partnerships executed instruments which effected sales or assignments of their oil and gas leases, or of their entire interests therein, they deprived themselves of the right to receive or to continue to receive allowances granted by the Revenue Act for depletion purposes. Appellant's whole contention is that those instruments amounted in law to sub-leases. The argument is that in Louisiana royalty is always rent; and from it the conclusion is drawn that these instruments established the relationship of landlord and tenant, and consequently cannot rightly be construed as assignments. The result is that appellant claims that the allowance for depletion should be apportioned seven-eighths to the partnerships and one-eighth to the land owners; and that the other parties to their contracts, although they developed the leases and produced the oil, are not entitled to any depletion allowance since they are only tenants holding under subleases. The Waller case dealt with the Smitherman partnership, and the Herold case with the Baird partnership. The detail facts as stated in the opinions in those cases need not be repeated here. The original lessors granted the right of assignment of the leases, in whole or in part. Smitherman's contract with the Ohio Oil Co., which was signed by both the contracting parties, declared that Smitherman "did sell, assign, set over, transfer and deliver, without warranty or recourse", unto the Ohio Oil Co. an oil and gas lease which he had previously acquired, in consideration of three million dollars cash, one million dollars to be paid out of half of the first oil produced and saved, "and subject to the further obligation of the said assignee, its successors and assigns to pay over and deliver unto the said assignor, * * * the equal one-eighth of all oil produced and saved from the above described premises as an excess royalty." It was made subject to the payment by the assignee of 1/8 royalty to the original lessor. Baird entered into a contract, also signed by both contracting parties, that he would "sell, assign, convey and deliver" to the Gulf Refining Co. "the entirety of said mineral lease," the consideration being in part $325,000, and in part the obligation of that company to continue to operate the lease, and to pay him 1/24 royalty for three years, and thereafter a 1/32 royalty. Baird's contract further de-

clared that he had executed an assignment to the Gulf Refining Co. "of his entire interest in the said lease, which said assignment he agrees to deposit in escrow". The document so referred to as an assignment, although admittedly it was delivered, does not appear either in this record or in the record in the Herold case, but we assume that in form it really was an assignment. Both of these instruments, the one executed by Smitherman and the other by Baird, are, according to the plain meaning of the language employed, complete assignments of the entire interests of the partnerships. There is nothing in either instrument to indicate that it was the intention of the parties to it to create the relationship of landlord and tenant. The operating companies became obligated to account directly to the original lessors for their share of the oil. The consideration in each contract was part money and part so-called royalty. It is not reasonable to suppose that it was the intention of the contracting parties that either the Ohio Oil Co. or the Gulf Refining Co. should surrender the benefit of the depletion allowance on $4,000,000 in the one case and $325,000 in the other. These cash payments were not advance royalties. It is true that in Work v. Mosier, 261 U. S. 352, similar payments were held to be advance royalties, but the reason is plain. Indian lands were involved in that case, and the law permitted the granting of leases, but did not authorize sales. Advance payments were held to be royalties, because they could not be anything else. The obligation to pay a 1/8 or a 1/32 royalty was the individual covenant of the assignees. The terms of the contracts preclude the idea of forfeiture based upon a failure to pay royalty, and are consistent only with the right of the purchasers to take all except the royalty oil, of which, with that exception, upon production they became the absolute owners. We do not doubt that royalty reserved by the owner of land is rent, but in our opinion it does not follow that royalty received by a lessee is rent where the lessee receives a substantial additional consideration, and the language of the instrument executed by him clearly indicates a sale and transfer of his lease. In the latter case we think the royalty is just as much a part of the consideration as is the cash payment. In our opinions in the Waller and Herold cases we referred to some of the Louisiana decisions and came to the conclusion that in that State as else-

where royalty may form a part of the consideration paid for the assignment of a mineral lease. Since those opinions were written, the Supreme Court of Louisiana has decided the case of Roberson v. Pioneer Gas Co., 137 Sou. 46, and it is argued has arrived at the opposite conclusion. The questions before that court were, whether a particular kind of oil and gas lease was divisible, and whether the drilling of a well upon a part of the land as to which the lease had been assigned inured to the benefit of the lessee holding another part as to which the lease had not been assigned. We are unable to agree that the question as to what constitutes a sublease, as distinguished from an assignment, was before the Supreme Court of Louisiana in that case for decision. But even if appellant occupied the position of a sublessor, there is a broader ground upon which in our opinion the judgment against him should be upheld. The section of the Revenue Act upon which this action is founded concludes as follows: "In the case of leases, the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee." It cannot well be doubted that the Ohio Oil Co. and the Gulf Refining Co. were lessees within the meaning of the language just quoted, and were entitled to share in the depletion allowance. Lynch v. Alworth-Stephens Co., supra. They would suffer a greater loss from depletion than would the holders of the over-riding royalty. Over-riding royalties were not unknown at the time of the passage of this act of Congress. It is almost inconceivable that it was the intention of Congress to withhold an allowance for depletion from the operator of an oil and gas lease who produces all the oil and upon the production of which he owns the greatest portion, and grant it to the holder of an over-riding 1/32 royalty. It may be that Congress intended to allow also depletion to the holder of an over-riding royalty, but the provision that the allowance should be equitably apportioned forbids the conclusion contended for in this case. Appellant does not sue to recover for depletion based on the proportion which his share of oil bears to total production; and it was admitted in the argument that during the taxable years involved he received allowances measured by his royalty interests. Whether therefore he is entitled to such allowance is a question which is not now before us for consideration. We have no hesitation in saying that in our opinion he is not

equitably entitled to allowances for depletion based on the so-called advance royalties, or money payments, or on 7/8 of the oil produced. As in our opinion The Ohio Oil Co. and the Gulf Refining Co. are to be considered as lessees and beneficiaries within the meaning of the Revenue Act providing equitable apportionment between the lessor and the lessee, it matters not that under the laws of Louisiana they are to be treated as tenants holding under sub-leases. Weiss v. Wiener, 279 U. S. 333. In the Waller case it is said that if the Smitherman contract evidenced a sub-lease, the decision of the Board of Tax Appeals was wrong; but that was the concession of counsel for the Commissioner. 16 B. T. A. 574, 580.

For reasons stated in the Herold case we think the cross appeal is without merit. The members of the Baird partnership paid income tax in 1919 on the $350,000 which were paid in 1921 by the Gulf Refining Co. in order to get possession of the lease. That sum was not income in 1921 of the Baird partnership.

Appellee takes nothing by the cross appeal. On the direct appeal, the judgment is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

E. G. PALMER

versus

JACOB O. BENDER, Individually and as Collector of Internal Revenue for the District of Louisiana,

and

MRS. AGNES B. McGRAWL BENDER, Individually, as the Surviving Widow in Community, etc., et al.

versus

E. G. PALMER

JUDGMENT—March 26, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and ad-

judged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed on the direct appeal and that appellee take nothing by the cross-appeal.

Petition for rehearing, covering five pages, filed April 12, 1932, omitted from this print. It was denied and nothing more by order of April 23, 1932.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—April 23, 1932

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,912. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 215. E. G. Palmer, petitioner, vs. Mrs. Agnes B. McGrawl Bender, administratrix of the estate of Jacob O. Bender, late Collector of Internal Revenue for the District of Louisiana. Petition for a writ of certiorari and exhibit thereto. Filed July 12, 1932. File No. 36,912.

FILE COPY

JUL 12 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 215

E. G. PALMER,

Petitioner,

versus

MRS. AGNES B. McGRAWL, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
HENRY P. DART,
HENRY P. DART, JR.,
Attorneys for E. G. Palmer, Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No._____

E. G. PALMER,

Petitioner,

versus

MRS. AGNES B. McGRAWL, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Petitioner E. G. Palmer, an individual, respectfully shows to this Honorable Court that this is a petition for a writ of certiorari to the Circuit Court of Appeals, Fifth Circuit, to review a decision made and entered by that Court on March 26, 1932 (R. 425), affirming, on the issue involved, a decision of the District Court of the United States for the Western District of Louisiana (R. 98), Petitioner filed a petition for rehearing on April 12, 1932, which was denied on April 23, 1932 (R. 438).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. History of Case.

This case involves income taxes for the years 1921 and 1922. Petitioner, pursuant to assessment and demand from the Collector, paid certain additional income taxes, and filed claims for refund which were denied (R. 54). Suit for recovery was instituted in the United States District Court for the Western District of Louisiana on December 20, 1929, which Court on March 4, 1931, rendered its decision denying recovery on the issue of depletion involved, and allowing recovery on the question whether a certain payment by the Gulf Refining Company in 1921 constituted taxable income to a partnership of which petitioner was a member (R. 98-115).

An appeal and a cross appeal were taken by petitioner and the Collector of Internal Revenue, respectively, to the Circuit Court of Appeals, Fifth Circuit, and that Court on March 28, 1932, handed down its decision affirming the District Court on both points. Rehearing was denied to petitioner (R. 438).

After the rendition of the judgment in the District Court the defendant Collector died and his administratrix, Mrs. Agnes B. McGrawl Bender, was properly substituted appellee and appellant respectively and it was ordered by the court that the case proceed thenceforth in the name of said substituted appellee and appellant. (R. 422-3).

2. Facts Involved.

A partnership called J. E. Smitherman, Special Account, of which petitioner E. G. Palmer is a member, discovered oil on a large tract near Haynesville, Louisiana, by drilling and completing the first producing well thereon on March 30, 1921 (R. 31). The partnership was lessee of the land. Prior to this date no oil had been discovered within 12 miles of the tract (R. 31). The fair market value of the property at the date of discovery or within 30 days thereafter was substantial and was materially disproportionate to cost (R. 51).

In computing his net income from the property, petitioner, as a member of the partnership and as lessee and discoverer, was entitled, under the existing Revenue Law, to depletion deductions based on the value of the property at the time of the discovery or within 30 days thereafter. *Section 214 (a) 10, Revenue Act of 1921,* provides in part as follows:

> "(a) That in computing net income there shall be allowed as deductions:
>
> (10) In the case of mines, oil and gas wells, * * * a reasonable allowance for depletion * * *, according to the peculiar conditions in each case * * *: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: * * * In the case of leases the deductions allowed by this paragraph

shall be equitably apportioned between the lessor and lessee."

Within 30 days after the discovery, the partnership transferred leases affecting 120 acres adjacent to the discovery well to the Ohio Oil Company for $3,000,000 cash and $1,000,000 to be paid out of oil, the partnership reserving besides one-eighth of the oil to be produced from the property as an overriding or excess royalty (R. 31).

The partnership treated the agreement with the Ohio Oil Company as a sublease, the one-eighth excess royalty as rental, and the payments of $3,000,000 cash and $1,000,000 out of oil as bonuses or advance royalties paid by the Ohio Oil Company to secure the sublease (R. 49-51). The nature of the payments made by the Ohio Oil Company and the deductions for depletion therefrom in arriving at the net income of the partnership is the matter primarily involved here. The Regulations of the Treasury Department then in existence *(Article 215 (a), Regulations 45, 1920 Edition)* provided for depletion deductions by a lessor against bonuses or advance royalties, which regulation was as follows:

> **"Depletion—Adjustments of accounts based on bonus or advanced royalty.** (a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the amount remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the amount remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the amount remaining to be recovered by the lessor through depletion, the differ-

> ence may be recovered through depletion deductions based on the royalties thereafter received to the extent that such deductions are legally allowable. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition."

Article 215 (a) of Regulations 62 applying the 1921 Revenue Act was identical with the above.

The partnership of which petitioner was a member took such authorized deductions against the bonuses or advance royalties in computing the distributive net income of the partnership for the years 1921 and 1922. Petitioner in his personal returns reported his share of such distributive net income of the partnership (R. 322).

In November, 1926, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, amended *Article 215 (a) of Regulations 45 and 62, supra*, by Treasury Decision 3938, C. B. Dec. 1926, p. 117, which is as follows:

> "(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received."

On audit of petitioner's returns the Commissioner of Internal Revenue disallowed the depletion deductions

against the $3,000,000 and $1,000,000 payments made by the Ohio Oil Company on the ground that the agreement between the partnership and the Ohio Oil Company constituted a sale and not a sublease, and that the payments of $3,000,000 cash and $1,000,000 out of oil constituted the consideration paid by the Ohio Oil Company for the lease. As a result of such disallowance the additional taxes in controversy here were then assessed and collected by the Treasury Department. Claims for refund by the petitioner were made by using the formula in the amended regulation, *supra*, (Treasury Decision 3938) in computing the depletion deductions.

The District Court for the Western District of Louisiana upheld the Commissioner of Internal Revenue on the question of sale or sublease on the authority of *Waller v. Commissioner, 40 F. (2d) 892.* The District Court expressed considerable doubt as to the correctness of its ruling in view of the case of *Smith v. Sun Oil Co., 165 La. 907,* decided by the Supreme Court of Louisiana, distinguishing a sublease from an assignment in that State (R. 98-114), but felt constrained to follow the decision in *Waller v. Commissioner, supra.*

The Circuit Court of Appeals, while apparently upholding the Commissioner and its own former decisions on the question of a sale or sublease, appears to base its decision denying depletion to the petitioner, primarily, on the ground that Article 215 (a) of Regulations 45 and 62, as amended by Treasury Decision 3938, is not a reason-

able application of the depletion provisions of the Revenue Laws. The Court said in part:

> "But even if appellant (Palmer) occupied the position of a sublessor, there is a broader ground upon which in our opinion the judgment against him should be upheld. * * * We have no hesitation in saying that in our opinion he is not equitably entitled to allowances for depletion based on the so-called advance royalties, or money payments, or on ⅞ths of the oil produced." (R. 425).

The above language is tantamount to holding that the regulation in question is not a reasonable interpretation of the provision of the Revenue Law providing for depletion deductions on discovery revaluation.

Petitioner was also a member of the George O. Baird partnership, wherein a similar question of sale or sublease was presented (R. 98-108). The facts with respect to the Baird partnership were stipulated (R. 92), and are not set forth here, as a decision on the facts of the Smitherman partnership would be determinative of that issue also.

3. Questions Involved.

(1) Due to the language of the Circuit Court of Appeals holding that petitioner is not entitled to allowances for depletion based on the advanced royalties, the primary question here is whether Article 215 (a) of Regulations 62, as amended by Treasury Decision 3938, is a reasonable and proper application of Section 214 (a) of the Revenue Act of 1921.

(2) Were the transfers of the oil and gas leases from Smitherman to the Ohio Oil Company and from

Baird to the Gulf Refining Company sales (assignments) or sub-leases?

(3) If sub-leases, was the petitioner as sub-lessor entitled to deductions for depletion based upon discovery value as of the basic date on the bonus, advanced royalties or other sums received thereunder?

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In its disapproval of Article 215 (a), Regulations 45 and 62, as amended, the opinion of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Murphy Oil Company v. Burnet, 55 F. (2d) 17*, decided January 11, 1932. That court in the *Murphy Oil Company* case expressly approves the identical regulation, saying, in part (p. 25):

> "The regulation is not only not in conflict with the statute, but directly conforms thereto."

In the *Murphy* case, the "basic date" for revaluation for depletion purposes was March 1, 1913, the lease having been acquired prior to that date. In this case the "basic date" for revaluation for the same purpose was March 30, 1921, the date of the discovery of oil.

If such a conflict between two U. S. Circuit Courts of Appeals were permitted to continue, it would result in great uncertainty and confusion in the administration of

the income tax laws and gross injustice to the citizens adversely affected.

Petition for writ of certiorari in *Murphy Oil Co. v. Burnet, Commissioner of Internal Revenue*, No. 955 of the docket of this Honorable Court was granted on May 31, 1932.

2. The Circuit Court of Appeals, in disapproving the regulation, decided an important question of Federal income tax law, which has not been but should be settled by this court. Depletion deductions against advance royalties, bonuses or money payments in connection with oil and gas leases have been provided for by Treasury regulations at all times since the 1918 Revenue Act. It is true that Article 215 (a) of Regulations 45 and 62 promulgated originally under the 1918 and 1921 Revenue Acts, respectively, was amended in 1926 by Treasury Decision 3938, which provided a somewhat different formula for computing the deduction. However, the principle involved, namely, that where the royalty is anticipated, the deduction should also be anticipated, has remained the same. Successive Revenue Acts have been passed during the existence of the regulation, thus evidencing Congressional approval.

The regulation is a reasonable and proper one in that it correlates gross income of oil or gas properties and the depletion deductions therefrom, and thus prevents a distortion of net income. Depletion based on discovery

valuation was a statutory grant by Congress to the oil and gas industry. Advance royalties in the nature of cash bonuses or lump sum advance payments are common in the leasing and subleasing of oil and gas properties. This Court has held that such cash bonuses or advance royalties are just as much royalties as the stipulated regular royalties paid with relation to the production *(Work v. Mosier, 261 U. S. 352, 357-358)*. The Revenue Act provides that depletion shall be "equitably apportioned between the lessor and the lessee" *(Section 214 (a) (10), Revenue Act of 1921)*.

Where the royalties are paid to the lessor in advance of actual production, there can be no equitable apportionment of the depletion deduction to the lessor, if he is not able to take the deduction in the same year he received the advance payments. Such circumstances gave rise to the regulation here in question.

In his brief below, respondent conceded the applicability of the Regulations to sub-lessors.

The Commissioner of Internal Revenue was given specific authority in the Revenue Act to promulgate regulations concerning depletion deductions on oil and gas properties. The regulation in question was a proper exercise of that authority. Of necessity much latitude was given to the administrative officers charged with the duty of enforcing the law. Their interpretation of the statute should not be interfered with, unless clearly unlawful *(Lucas v. American Code Co., 280 U. S. 445)*.

3. The question of the nature of the transfers here involved was presented to the Circuit Court of Appeals for the Fifth Circuit in *Waller v. Commissioner, 40 F. (2) 892* and *Herold v. Commissioner, 42 F. (2) 943.* In *Waller v. Commissioner* the government conceded the right to depletion if the transfer was a sublease *(16 B. T. A. 574).* They were held in those cases to be sales or assignments and not subleases. Petition to this court for writ of certiorari in the *Waller* case was denied. No such petition was presented in the *Herold* case. Since the date of the decisions in those cases, and the refusal of the writ in the *Waller* case, the Supreme Court of Louisiana has had occasion to review the entire jurisprudence of the State on the question in *Roberson v. Pioneer Gas Co., 173 La. 313 (137 So. 46)* and has restated it in a manner diametrically opposed to the construction of the Circuit Court of Appeals in those cases and in the present controversy. The decisions of the Circuit Court are postulated on common law definitions taken from common law encyclopedia which are unsupported by the citation of Louisiana authorities. Such is in direct conflict with the decision of this court in *Viterbo v. Friedlander, 120 U. S. 707,* wherein the fundamental, basic difference between the common law and the civil law conceptions of lease was so graphically stated as to preclude the consideration of common law authorities with reference to Louisiana leases.

The decision of the Circuit Court of Appeals in this case, following its pronouncements in *Waller v. Commissioner* and *Herold v. Commissioner,* both *supra,* is in di-

rect conflict with the Revised Civil Code of Louisiana, as interpreted and applied by the Supreme Court of Louisiana.

In the above cases, the Circuit Court of Appeals held the retention of a reversion to be necessary to characterize the transfer of a lease as a sublease, the common law test. In *Roberson v. Pioneer Gas Co., 173 La. 313 (137 So. 46)* the Supreme Court of Louisiana restating and reaffirming the doctrine of *Smith v. Sun Oil Co., 165 La. 907* and *Johnson v. Moody, 168 La. 799*, said the stipulation for a new rental characterized the transfer of a lease as a sublease and that the retention of an over-riding royalty in the transfer of an oil lease was the stipulation for a new rental, citing *Spence v. Lucas, 138 La. 763; Logan v. State Gravel Co., 158 La. 105; Board of Commissioners v. Pure Oil Co., 167 La. 801.* The Circuit Court of Appeals sought to distinguish these authorities by saying royalty, payable in oil, might be, and was in this case, not rent, but a part of the purchase price. No cogent reasons were assigned for this statement and it was supported by the citation of only one case in Louisiana jurisprudence, the case of *Wilkins v. Nelson, 155 La. 808*, which was incorrectly cited. In *Herold v. Commissioner, 42 F. (2) 942*, the court cited *Wilkins v. Nelson, 155 La. 808*, as holding royalty may form part of the consideration for mineral rights. In *Wilkins v. Nelson, 161 La. 437*, the Supreme Court of Louisiana said "the mineral contract in question was declared to be a lease in *Wilkins v. Nelson, 155 La. 810.*" Moreover, Articles 2439 and 2464, Revised Civil Code of Louisiana, require the price of a sale to be a certain sum payable in current money while Article 2671, Revised Civil

Code, permits the price of a lease to "consist of a certain quantity of commodities or even of a portion of the fruits yielded by the thing leased."

The decision in the case therefore is basically and diametrically opposed to the entire jurisprudence of Louisiana; to the applicable provisions of the Civil Code of that State, and to the entire civil law philosophical concept of lease. To determine this particular question, the Circuit Court of Appeals has decided a question of local Louisiana law, affecting Louisiana citizens and Louisiana property, contrary to the Louisiana law and jurisprudence; and by reference to a system of laws held by this Honorable Court to be inapplicable to the subject matter in Louisiana. *(Viterbo v. Friedlander, supra).*

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 6409 E. G. Palmer v. Jacob O. Bender, individually and as Collector of Internal Revenue for the District of Louisiana, and that the judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed in so far as it denies plaintiffs the relief therein sought and the cause be ordered remanded to be remanded to the United States District Court with instructions to compute and enter judgment for petitioner, allowing additional deductions for depletion in

respect of the bonuses or advanced royalties received by the Smitherman and Baird partnerships, such deductions to be based upon the discovery revaluation of the properties and computed under the formula provided in the amended regulations, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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HENRY P. DART, JR.,
Attorneys for E. G. Palmer.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No._____

E. G. PALMER,

Petitioner,

versus

MRS. AGNES B. McGRAWL, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in *57 F. (2) 32.*

II.

JURISDICTION.

The jurisdiction of this court is invoked on the following grounds:

(1) The judgment to be reviewed was originally entered March 26th, 1932 (R. 425). The taxpayer filed a petition for rehearing which was submitted on April 12, 1932, and denied April 23, 1932 (R. 438).

Time to apply for a writ of certiorari, therefore, runs from April 23, 1932 *(Citizens Bank of Michigan v. Apperman, 249 U. S. 448, 450; Morse v. United States, 270 U. S. 151.*

2. The United States District Court had jurisdiction of this case under Section 1113, Revenue Act of 1926 *(Sec. 3226 of Revised Statutes as amended).* The appeals to the United States Circuit Court of Appeals were taken in pursuance of the provisions of Section 128 of the Judicial Code.

3. This court has jurisdiction to review the judgment of the Circuit Court of Appeals. *Judicial Code, Sec. 240)* (a) as amended by Act of February 13, 1925. The Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit, the decision of the Ninth Circuit in the case of *Murphy Oil Co. v. Burnet, 55 Fed. (2d) 17,* and has also decided an important question of local law in conflict with applicable local decisions, to-wit, the decisions of the Supreme Court of Louisiana in the cases of *Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. Rep.*

46; Smith v. Sun Oil Co., 165 La. 907, 116 So. 379, 380; Johnson v. Moody, 168 La. 799, 123 So. 330. The Circuit Court of Appeals has also decided an important question of Federal Income Tax Law which has not been and should be settled by this court.

III.

QUESTIONS INVOLVED.

The primary question presented by the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is whether petitioner is entitled to depletion deductions in respect of the bonus or advanced royalty in accordance with the Treasury regulations; the decision of that Court in refusing such allowance having squarely placed at issue the validity of *Article 215 (a)* of Regulations 62, as amended by Treasury Decision 3938, as reasonable and proper application of *Section 214 (a)* of the Revenue Act of 1921.

There is likewise presented the question of the nature of the transfers of the oil and gas leases involved. Petitioner contends they were sub-leases; the Government contends they were sales or assignments. In its decision in this case the Circuit Court of Appeals intimates that it would adhere to its decisions on that question in *Waller v. Commissioner, 40 F. (2d) 896,* and *Herold v. Commissioner, 42 F. (2d) 942,* in spite of the decision of the Supreme Court of Louisiana in *Roberson v. Pioneer Gas Co., 173 La. 313,* decided subsequent to those two cases, in a manner directly opposed to the rulings in those cases on that point. Petitioner contends that the decisions of the Circuit Court of Appeals on that question are wholly at

variance with the statutes and jurisprudence of Louisiana, are incompatible with the civil law concept of lease, and are based on definitions taken from the common law, which this Honorable Court has rejected as inapplicable to a consideration of leases in Louisiana, and without the support of a single case decided by the Supreme Court of Louisiana.

IV.

SPECIFICATIONS OF ERROR.

(1)

That the United States Circuit Court of Appeals erred in disapproving Article 215 (a), Treasury Regulations 62, as amended by Treasury Decision 3938.

(2)

That the said Court erred in not holding that Article 215 (a), Treasury Regulations 62, as amended by Treasury Decision 3938, constitutes a proper interpretation and application of the depletion provisions of the 1921 Revenue Act.

(3)

That the said Court erred in not holding that petitioner as a member of the Smitherman partnership and Baird partnership, was entitled to depletion deductions in 1921 and 1922 with respect to the bonuses or advanced royalties received by those partnerships.

(4)

That the said Court erred in denying petitioner's claim for refund, which claimed refund was based on de-

pletion deductions with respect to the bonuses or advanced royalties received by the partnerships.

(5)

That the said Court erred in holding the contract between James E. Smitherman and the Ohio Oil Company, dated April 23, 1921 (Exhibit N, R. 242) and the contract between George O. Baird and the Gulf Refining Company, dated November 26, 1921 (Exhibit Y, R. 313) to be sales or assignments, and in not holding them to be sub-leases.

(6)

That the said Court erred in not construing those contracts according to the Civil Law of Louisiana, as distinguished from the Common Law, and in not following the jurisprudence of Louisiana as reaffirmed in *Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. Rep. 46.*

(7)

That the said Court erred in not giving effect to the doctrine of *Roberson v. Pioneer Gas Company, supra,* as to the distinction between sub-leases and assignments.

(8)

That the said Court erred in holding the over-riding or excess royalty respectively reserved by Smitherman and Baird in the aforesaid contracts to be part of the purchase price of a sale.

(9)

That the said Court erred in not holding such excess royalties to be rent, as established by the Revised Civil Code of Louisiana and the jurisprudence of the Supreme

Court interpretative thereof; and particularly *Revised Civil Code, Articles 2439, 2464* and *2671*, and *Logan v. State Gravel Co., 158 La. 105; Board of Commissioners v. Pure Oil Co., 167 La. 801; Wilkins v. Nelson, 161 La. 437.*

(10)

That the said Court erred in holding the failure of the Ohio Oil Company and the Gulf Refining Company to respectively pay Smitherman and Baird the over-riding or excess royalties retained by them would not entail forfeiture of the rights of the Ohio and Gulf companies under the said contracts; which ruling of the Court is in direct conflict with the Revised Civil Code of Louisiana and the interpretative jurisprudence of the Supreme Court of Louisiana, particularly, *Revised Civil Code, Article 2712* and *Louisiana Oil Refining Corporation v. Cozart, 163 La. 90.*

(11)

That the said Court erred in holding that even if the instruments in question constituted sub-leases, the petitioner, as a member of the Smitherman and Baird partnerships, discoverers of the oil wells in question, would not be entitled to depletion deductions based on discovery revaluation, said deductions to be taken against the bonuses or advanced royalties received.

(12)

That the Circuit Court of Appeals erred in not reversing the decree of the District Court and in not remanding the case with instructions to render judgment in favor of the petitioner as prayed for.

ARGUMENT.

I.

Article 215 (a), Regulations 62, as amended, is a reasonable interpretation and application of the depletion provisions of the Revenue Act of 1921, and should not be disturbed.

This case involves the validity of a Treasury Regulation with respect to deductions for depletion in arriving at the taxable net income of petitioner. The facts concerning the Smitherman partnership, of which petitioner was a member, have heretofore been set out briefly at page 3 of the petition. The pertinent portions of the Regulations, both as originally promulgated and as later amended, are set forth at pages 4-5 of the petition. The income taxes sought to be recovered are for the years 1921 and 1922, and were collected under the 1921 Revenue Act. The original Regulation *(Article 215 (a), Regulations 62)* was in effect when petitioner made his return, and the deductions for depletion were taken thereunder. At the time this suit was brought in the District Court below the Regulation had been amended by Treasury Decision 3938. Therefore, in the District Court petitioner sought recovery of the taxes on the basis of the amended Regulations, and it is this interpretation of the Revenue Act by this Department which is here involved.

The transactions concerning the leases were carried out by the Smitherman partnership, of which petitioner was a member. Inasmuch as a partnership is not a taxable entity separate from its members under the 1921

Revenue Act, reference hereafter will be made only to petitioner.

Petitioner and his associates in 1921 discovered oil on a large tract near Haynesville, Louisiana, of which they were lessees. The fact that petitioner was a discoverer places him in a special category for the purpose of computing his net income derived from the oil property. *Section 214 (a) of the Revenue Act of 1921* provides as follows:

> "That in computing net income there shall be allowed as deductions:
>
> "(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case * * *: *Provided further*, that in the case of mines, *oil* and gas *wells, discovered by the taxpayer*, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease: where the fair market value of the property is materially disproportionate to the cost, *the depletion allowance shall be based upon the fair market value of the property at the date of discovery, or within thirty days thereafter;* such reasonable allowance in all the above cases to be made under the rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. * * *." (Italics supplied).

It will be seen from the above that petitioner as discoverer was entitled to deductions for depletion based on the fair market value of the property at the time of the discovery or within 30 days thereafter, there being no question but

that such fair market value was materially disproportionate to cost.

Prior to the transaction with the Ohio Oil Company petitioner and his associates as primitive lessees were entitled to ⅞ths of the oil, while the lessors (landowners) were entitled to ⅛th of the oil. Section 214, *supra*, provides for an equitable apportionment of the depletion deduction between the lessee and the lessor. Such equitable apportionment of the deduction between petitioner and his lessors was to be made under Regulations of the Commissioner of Internal Revenue.

Such was the situation at the time of the discovery of the well. Within a month thereafter petitioner and his associates entered into an agreement with the Ohio Oil Company wherein the Ohio Oil Company paid the partnership $3,000,000 in cash, agreed to pay $1,000,000 out of oil and agreed further to pay over and deliver one-eighth of the oil produced and saved from the leased premises as an excess or over-riding royalty as long as the property produced oil in paying quantities.

It is assumed for this part of the brief that the contract with the Ohio Oil Company constituted a sublease, the ⅛th royalty being rent and the payments of $3,000,000 and $1,000,000 being bonuses or advance royalties paid to secure the sublease.

The original Regulation *(Article 215 (a), Regulations 62)* was in existence at the time petitioner made his return. This Regulation authorized a taxpayer to take depletion deductions against bonuses or advance royalties, and petitioner took such deductions in his original return.

These deductions were disallowed, and additional taxes were paid under protest, pursuant to such disallowance. Meanwhile, the Regulation was amended so as to change the formula for computing the deduction. The refund claim and suit in the District Court below were based on a recomputation of taxes on the basis of such amended Regulation. The Circuit Court of Appeals in its opinion disapproved the amended Regulation for reasons hereinafter discussed.

Thus the question presented is whether the Regulation is a reasonable application and interpretation of the depletion provisions of the Revenue Law.

(1) Opinion of Circuit Court of Appeals.

The Circuit Court of Appeals disapproved the Regulation in question, and denied the depletion deductions to petitioner. The opinion states in part:

> "But even if appellant (Palmer) occupied the position of a sublessor, there is a broader ground upon which in our opinion the judgment against him should be upheld. * * * We have no hesitation in saying that in our opinion he is not equitably entitled to allowances for depletion based on the so-called advance royalties, or money payments, or on 7/8ths of the oil produced." (R. 425).

The reasons assigned by the court for holding the Regulation invalid are unique, and as will be seen, the court in its opinion overlooked pertinent provisions of the 1921 Revenue Act. The opinion states in part:

> "It is not reasonable to suppose that either the Ohio Oil Co. or the Gulf Refining Co. should surrender the benefit of the depletion allowance on

$4,000,000 in the one case and $325,000 in the other."

Later in the opinion it is stated:

"It is almost inconceivable that it was the intention of Congress to withhold an allowance for depletion from the operator of an oil and gas lease who produces all the oil and upon the production of which he owns the greatest portion, and grant it to the holder of an overriding * * * royalty."

In other words, according to the opinion, an allowance of the deduction to petitioner would have the effect of denying depletion deductions to the Ohio Oil Company as sublessee. However, such is not the case. The Ohio Oil Company came on the scene as sublessee **after** the discovery, and any interest it acquired was in a proven property in the form of a producing well. Not being the taxpayer who discovered the property, the Ohio Oil Company was not entitled to depletion based on the fair market value of the property at the time of discovery. Its basis for depletion was cost. *Section 214 (a) (10) of the Revenue Act of 1921* contains the following provision:

"In the case of mines, **oil** and gas **wells**, other natural deposits, and timber, a reasonable allowance for depletion, and for depreciation of improvements, according to the peculiar conditions in each case, **based upon cost**, including cost of development not otherwise deducted."

The Commissioner of Internal Revenue in *Article 203 of Regulations 62* provides in subsection (d) as follows:

"The value of a lessee's equity in a proven mineral property acquired on or after March 1, 1913, is its cost."

It appears clear from the above that the basis for petitioner's depletion and the basis for the Ohio Company's depletion are entirely different. One bears no relation whatsoever to the other. In order to be entitled to depletion based on discovery value, the taxpayer must be the discoverer or his lessor at the time of discovery. Under the law only those who stood in the position of lessee or lessor at the time of discovery are entitled to depletion based on discovery revaluation. The Circuit Court of Appeals below is, therefore, clearly in error, having apparently overlooked the plain wording of the statute which provides cost as the depletion basis for a taxpayer who becomes a lessee subsequent to discovery.

The only other decisions which consider the validity of the Regulation are those of the Board of Tax Appeals and the Circuit Court of Appeals for the Ninth Circuit in the case of *Murphy Oil Company v. Commissioner, 15 B. T. A. 1203, 55 Fed. (2) 17,* (certiorari granted May 31, 1932).

(2) Murphy Oil Company Case.

In the case of *Murphy Oil Company v. Commissioner* the Board of Tax Appeals disapproved the Regulation in question on an entirely different ground *(15 B. T. A. 1203)*. The Board there held that the depletion deduction can be measured only by the oil produced, and that any depletion allowance against bonuses or advance royalties is a departure from the depletion concept.

The *Murphy Oil Company* case was taken to the Circuit Court of Appeals for the Ninth Circuit. That court considered at length the identical regulation concerning

allowances for depletion against bonuses or advance royalties. The court reversed the Board, and said in part as follows, *55 Fed. (2) 17:*

> "The position of the board in this case is to the effect that the bonus does not come within the provisions of the statute in reference to capital gain and that it must therefore be treated as income notwithstanding the provisions of the statute and of the regulations regarding depletion allowances. It will also be observed that the board classified bonus as identical with royalty oil and that neither could justly be regarded as return of capital, while the whole theory of the depletion allowance is that the proceeds derived from the sale of royalty oil is of necessity in part a return of capital. It is the only manner in which the capital represented by the oil will be returned to the lessor, and for that reason is subject to a depletion allowance. The depletion allowance under the ruling of the commissioner in this case was made to the taxpayer upon the theory that although its royalty amounted to over two million dollars a large portion of that royalty constituted a return of capital which was allowed to it under the statute to compensate for the depletion of its oil reserve. The question in this case is the amount per barrel to be allowed to the petitioner as its returned capital and this must be determined by ascertaining, as the law provides, the fair market value of the property on March 1, 1913, and by allowing a reasonable allowance for depletion based in part upon that property value. The theory upon which the commissioner has proceeded in fixing petitioner's tax under the regulations of the Treasury Department is that the taxpayer is entitled to the return of his entire capital in the form of bonuses and royalties, and that his liability for tax upon the income is upon the balance of the income derived from the property after deducting the installment of capital included in the royalty oil. *The regula-*

tion is not only not in conflict with the statute, but directly conforms thereto. The statute with reference to depletion of oil properties is a special one with reference to the particular subject of oil leases involving the production of oil and minerals from mines, and the consequent return of capital by the owners of interests therein, and controls over other general provisions of the law in regard to the return of capital investments." (Italics supplied).

The above language clearly approves and upholds the Regulation in question. The Commissioner of Internal Revenue in that case made the same contention that petitioner is making here as to the validity of the Regulation.

(3) The Regulation is a proper application of the depletion provision.

Both the 1918 and the 1921 Revenue Acts gave the Commissioner of Internal Revenue specific authority to promulgate regulations under which depletion deductions were to be taken. Bonuses or lump sum advance payments for oil or gas leases are common in the oil industry. This Court has held that such payments are just as much royalties as the regular stipulated royalties paid with relation to production *(Work v. Mosier, 261 U. S. 352, 357-358).* When a lessor or sublessor receives such advance royalties they, as well as the regular royalties, are considered income from the use of the property *(Von Baumbach v. Sargent Land Company, 242 U. S. 503).* While such royalties are income, they are, nevertheless, gross income subject to any legal deduction in arriving at net income.

Depletion deductions for income tax purposes are of statutory conception and not of economic conception. A

taxpayer has no inherent right to depletion deductions, and if Congress had not granted the deduction, the entire income from operation of mineral properties would be taxable *(Stratton's Independence v. Howbert, 231 U. S. 399)*. Since depletion is purely a grant from Congress, the sole question here is one of construction of the depletion provisions of the Act and the validity of the Regulations specifically authorized by those provisions for the allowance of the deductions.

The amended Regulation in question proceeds on the same concept of a bonus as expressed by this Court in *Work v. Mosier, supra*, to-wit, that it is an advance royalty. The Regulation provides that the depletion deduction with respect to cash bonuses shall be an amount equal to that proportion of the basic value which the amount of the bonus bears to the sum of the bonuses or royalties expected to be received. This formula provides that the deductions shall be in direct proportion to and limited by the mineral content of the property. The bonus is in direct payment of the resources to be exhausted, being part of the royalty or rent paid therefor. Ordinarily both the royalty and the depletion deduction are measured by the actual exhaustion of the mineral content. Where, however, the royalty is paid partly in advance of the removal of the mineral content, the depletion deduction should likewise be taken partly in advance. In other words, the deduction should be correlated with the gross income in order to arrive at net income. This does not mean that the depletion deduction against the cash bonus prior to removal of the oil bears no relation to the mineral content to be removed. The deduction is directly related to and

limited by the basic value of the mineral to be exhausted. The allowances are so related that the total deductions cannot in the aggregate exceed the basic value. Thus the Regulation provides in part *(Article 215 (b), Regulations 62)*:

> "* * * no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made."

The Regulation also provides in extraordinary circumstances for the restoration to the capital account of depletion deductions allowed in excess of actual extraction of the mineral. The Regulation states:

> "(c) If, for any reason, any such mineral lease shall be terminated or abandoned before the mineral which has been paid for in advance has been extracted and removed, and the lessor repossesses the leased property, the lessor shall adjust his capital accounts by restoring to the capital sum of the property the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and his income account shall be adjusted so as to include the amount so restored to capital sum as income of the year such lease is terminated or the property repossessed, and the tax thereon paid.
>
> "(d) Upon the expiration, termination, or abandonment of a lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account so much of the bonus received and deducted from capital recoverable through depletion as is in excess of the actual depletion or loss in value sustained as a result of the operations under the lease and the

corresponding amount will be income for the year in which the lease expires, terminates, or is abandoned."

The Regulation, therefore, is no departure from the depletion concept in that the deductions are limited by and directly related to the exhaustion of the minerals. Indeed the Regulation provides a reasonable and equitable means of co-ordinating the deduction with the income received in point of time. Correlating the gross income with the deduction prevents a distortion of net income. This is illustrated in the case at bar. Petitioner as discoverer was entitled to deductions based on 7/8ths of the fair market value of the property at the time of discovery. He and his associates subleased the property to the Ohio Company in 1921 and received advance royalties or bonuses in the amount of approximately $4,000,000. To deny him the allowance in 1921 as deductions against the $4,000,000 gross income from the use of the property that year, would result in a clear distortion of income. Furthermore, it might well result in disallowing the deduction almost entirely, as there would be no other year in which petitioner would receive sufficient gross income from the use of the property against which to take the allowance.

We have no quarrel with the settled principle that each year should be treated separately for income tax purposes. We do believe, however, that such principle does not extend to the point of separating related income and expense items merely because they fall in two different periods. Often, in order to correctly reflect income, ex-

penditures creating benefits extending into other years are required to be deducted over the period of benefit *(Duffy v. Central Railroad, 268 U. S. 58)*. Expenditures made in prior years are authorized as deductions against gross income received in a later year in order to properly reflect net income. This practice, as authorized by regulations, has been recognized with approval by this Court with respect to long term contracts *(Burnet, Commissioner, v. Sanford & Brooks Co., 282 U. S. 359)*. Thus it is clear that the regulation here involved, in so far as it correlates gross income and the deduction in arriving at net income, is not entirely novel.

Other examples could be cited. When bonds are sold at a discount, the taxpayer is permitted to deduct such discount ratably over the life of the bonds to date of retirement *(C. R. I. & P. Ry. Co. v. Commissioner, 47 F. (2d) 990;* certiorari denied October 12, 1931). Brokers' fees to secure a lease were spread over the term of the lease rather than charged against income of the first year—thus co-ordinating income and deduction *(Bonwit Teller & Co. v. Commissioner, 53 F. (2d) 381)*. The use of inventories, permitting cost of goods in an earlier year to be set off against sales in subsequent years, is specifically authorized in the Revenue Acts.

It has been recognized in the law that a deduction, when reasonably ascertainable, may be anticipated and taken in the year when the gross income is received. The

1928 Revenue Act authorizes the deduction of future or anticipated expenses in connection with the sales of real property *(Section 23)*. The only purpose of the above provision is to permit the deduction in the year when the gross income is received, in order to properly reflect net income.

This Court in *Lucas v. American Code Company, 280 U. S. 445*, stated:

> "Generally speaking, the income-tax law is concerned only with realized losses, as with realized gains. Weiss v. Wiener, 279 U. S. 333, 335. Exception is made, however, in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are absolutely realized. * * * The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test."

The test of practicability is met here. Indeed the Regulation appears the only practical method of correlating the income of this petitioner derived from the Oil Company with the deduction to which he is entitled under the provisions of the Revenue Act. Any other interpretation would result in distortion of income—a result far from practical.

In conclusion we desire to point out that the principle of permitting depletion deductions against bonuses or advance royalties has long been recognized. Successive Revenue Acts have been passed by Congress during the existence of such regulations. The Revenue Act of 1921

was passed during the existence of the original *Regulation 215 (a)*. The 1928 Revenue Act was passed after the amendment to the Regulation contained in *T. D. 3938* had been promulgated by the Department.

It is settled law that after the re-enactment of a statutory provision which has received a well-settled administrative construction, such construction is deemed to have been adopted by Congress, unless the contrary is clearly indicated. In the recent case of *Brewster v. Gage, 280 U. S. 327, 74 L. ed. 457*, this Court, in referring to a similar situation with respect to regulations of the Commissioner of Internal Revenue, said as follows:

> "The substantial re-enactment in later acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. National Lead Co. v. United States, 252 U. S. 140, 146, 64 L. ed. 496, 499, 40 Sup. Ct. Rep. 237; United States v. Cerecedo Hermanos y Compania, 208 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; United States v. Falk, 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191. The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them."

And this Court in the case of *Lucas, etc., v. American Code Co., supra*, said:

> "Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the Act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful."

II.

The decision below holding transfers of oil and gas leases providing for cash bonuses, and excess or over-riding royalties, payable in oil to be sales or assignments, and not sub-leases is contrary to and in conflict with the established law of Louisiana.

In its brief below the Government conceded that "under the applicable statutes and Treasury Department Regulations . . . a lessor, including a sub-lessor, of mining property is entitled to a deduction from income on account of depletion," which is consistent with its concession previously made in the *Waller* case *(Waller v. Commissioner, 16 B. T. A. 574)* involving the Smitherman-Ohio transaction. It logically follows that a sub-lessor would be entitled to the same benefits as a lessor, for a sub-lease is in all respects a new lease superimposed on the original lease. *Smith v. Sun Oil Co., supra.*

In this case, the Circuit Court has apparently adhered to its former rulings in *Waller v. Commissioner, 40 F. (2) 892* and *Herold v. Commissioner, 42 F. (2) 942,* holding the transfers involved to be sales or assignments, but has gone further and denied relief under a construction of the applicable Revenue Laws and Regulations, that in effect destroys the validity of the Regulation which governs this case.

The opinion of the trial Judge (R. 98) shows that his decision was rendered against petitioner on this question only because he felt bound by the earlier decisions of the Circuit Court of Appeals, for the body of the opinion

is devoted entirely to an exposition of his belief that petitioner was entitled to depletion and that the instruments involved were sub-leases and not assignments.

Subsequent to the decision in those two cases, the Supreme Court of Louisiana decided *Roberson v. Pioneer Gas Co., 173 La. 313*, which again affirms and restates the law of Louisiana respecting the transfer of oil and gas leases by sub-lease or assignment. Tested by the *Roberson* case and the jurisprudence therein reviewed, particularly *Smith v. Sun Oil Co., 165 La. 907*, the transfers involved here are indubitably sub-leases. The Circuit Court of Appeals in this case, in effect, holds the doctrine of the *Roberson* case on this point to be *obiter dictum.*

We disagree with the Circuit Court on the proposition that those expressions are *obiter*, and were not at issue in the case. In *Smith v. Sun Oil Co., 165 La. 907*, the question was whether or not drilling on part of an oil and gas lease, divisible by assignment, would inure to the benefit of the whole lease. The court held that if the transfer was a sub-lease the drilling on part would inure to the benefit of the whole; if an assignment, drilling on part would not. There the transfer was held to be a sub-lease in an opinion which is a treatise on the whole question of assignment and sub-lease. In *Roberson v. Pioneer Gas Co., supra*, following *Smith v. Sun Oil Co., supra*, the plaintiff sued for cancellation of part of a lease, divisible by assignment, on the other part of which, the transferee of the original lessee, as to part only, had drilled a well. The syllogism of the defense was: development by a sub-lessee of part of a lease, divisible by assignment, inures to the

benefit of the entire lease; this development was made by a sub-lessee; therefore, the development inured to the benefit of the entire lease.

In arriving at its conclusion that the lease should be forfeited as to the undeveloped part, it was absolutely necessary for the Supreme Court of Louisiana to dispose of the contention by either holding that development by the sub-lessee of a part of a lease did not inure to the benefit of the whole tract, or that the transferee who developed a part was not a sub-lessee. The Court squarely adhered to its doctrine in *Smith v. Sun Oil Company*, but held the transferee to be an assignee and not a sub-lessee. The court, therefore, decided a matter squarely at issue in the case, and its expression regarding transfers of leases by sub-lease and assignment was the *ratio decidendi* of the case and not *obiter*.

The Court below has attempted in its opinion to break the force of the decision in *Roberson v. Pioneer Gas Co., supra*, by saying that it was "unable to agree that the question as to what constituted a sub-lease as distinguished from an assignment was before the Supreme Court of Louisiana for decision." But for this conclusion, the Court under its previous decision in *Harrell v. United Carbon Co., 52 Fed. (2nd) 790*, would necessarily have followed the *Roberson* case because they expressly held in the *Harrell* case that the *Roberson* case had definitely established a rule of property in Louisiana which they were bound to follow under *Guffey v. Smith, 237 U. S. 101*.

We have shown that the *Roberson* case did involve the question of the distinction between assignments and

sub-leases and we insist that the court below was wrong in holding to the contrary. That case is the last of a line of cases on the same subject, and the Circuit Court of Appeals should have followed it as a definite rule of property in Louisiana.

The ruling of the Circuit Court of Appeals in these cases, starting with *Waller v. Commissioner, supra*, is pitched upon the common law distinction between sub-lease and assignment, manifestly a false premise in view of this court's opinion in *Viterbo v. Friedlander, 120 U. S. 707.* In the *Waller, Herold* and *Palmer* cases, the Circuit Court has referred to no Louisiana statute and to but one Louisiana case (and then incorrectly) to support its conclusions.

A brief comparison and discussion of Louisiana jurisprudence and the civil law doctrine will demonstrate the principles underlying *Smith v. Sun Oil Co., 165 La. 907*, and *Roberson v. Pioneer Gas Co., 173 La. 313*, and will show that the views and opinion of Circuit Court of Appeals in this case are in direct conflict with Louisiana law and jurisprudence on the points involved.

In the *Waller* case, *supra*, the Circuit Court of Appeals stated the distinction between sub-lease and assignment to be as follows:

> "An assignment of a lease occurs where a lessee parts with his entire interest in the demised premises or a part thereof for the unexpired term of the original lease. 16 R. C. L. 824, 826; 35 C. J. 988, 989. If the assignor convey less than his entire interest in the whole or a part of his lease, so that there still remains in him a reversionary in-

terest, the transaction amounts to a sub-lease. 14 R. C. L. 826."

That is the common law distinction, derived from sources which cite no Louisiana case on the subject.

In *Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46*, decided more than a year after the *Waller* case, the Supreme Court of Louisiana stated the distinction in Louisiana to be as follows:

> "The distinction between an assignment of a lease and a sub-lease is that, in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a sublease, the original lessee, or sublessor, retains an interest in the lease in so far as it affects the property subleased—by imposing some obligation upon the sublessee in favor of the sublessor, such as an obligation to pay an additional rent to the sublessor. Robinson v. Freret, 9 La. Ann. 303; Audubon Hotel Co. v. Browning, 120 La. 1089, 46 So. 331; 124 Am. St. Rep. 456; Rev. Civ. Code, Art. 2725; Code Napoleon, Art. 1717; Baudry-Lacantiniere, Vol. 20, p. 616, No. 1052 and 1053; Beaudant, p. 374, No. 531 and 532; Marcade, Vol. 6, p. 112; Aubry et Rau, Vol. 5, p. 336."

The subject matter of the case was an oil and gas lease, and in construing it the Court said:

> "If the Pioneer Gas Company (lessee) had retained an overriding royalty, or excess royalty, to be paid by Pipes and Mack to the Pioneer Gas Company, in addition to the one-eighth royalty to be paid by Pipes and Mack to the original lessors, the contract between Pipes and Mack would have been a sub-lease and not merely an assignment of the lease

on the 40 acres of land. See Smith v. Sun Oil Company, 165 La. 907, 116 So. 379, 380, and Johnson v. Moody, 168 La. 799, 123 So. 330."

In the Common Law test adopted by the Circuit Court of Appeals the criterion is,—did the lessee retain a reversionary interest? In the Civil Law test announced by the Supreme Court of Louisiana, the distinction is,—did the lessee stipulate for a new rental? The tests are wholly incompatible.

In the *Waller* case the Circuit Court of Appeals considered the doctrine of *Smith v. Sun Oil Company, 165 La. 907*, not to be materially different from the common law test which it adopted in the *Waller* case, and said:

> "But, so far as material here, there is no difference in the rights of the lessor and the lessee under either system of law. In Smith v. Sun Oil Co., 165 La., 907, 116 So. 379, the conveyance in question was held to be a sublease instead of an assignment, but it was said that the lessor had not disposed of all its rights under the original lease, but had granted an interest less than its own and imposed obligations under penalty of reversion, among which were provisions to the effect that the rights of the lessor should revert to and revest in the lessor whenever the lessee should cease to develop the lease."

In direct opposition to that view, in *Roberson v. Pioneer Gas Co., supra*, the Supreme Court of Louisiana said:

> "In Smith v. Sun Oil Co. and in Johnson v. Moody, supra, we said that the obligation to pay an overriding royalty, in the contract which, in each of those cases, the parties called an assignment, was imposed upon the so-called assignee 'under penalty

> of reversion' to the original lessee, or sublessor; but we did not use the term 'reversion' in the technical sense in which it is used at common law. The reversion which we had in mind was merely the reversion of the right of occupancy or use of the property; because a contract of lease under the civil law, unlike the common law in that respect, does not convey to the lessee, temporarily, a title to the property leased, but conveys only the right to the use or enjoyment of the property. Rev. Civ. Code, Arts. 2669, 2674; Logan v. State Gravel Co., 158 La. 105, 103 So. 526."

The stipulation for a new rent at common law does not characterize the transfer of a lease as a sub-lease. *16 R. C. L. 827; 35 C. J. 990.*

The two tests cannot be reconciled. The Common Law test does not recognize the stipulation for a new rent (the basis of the Civil Law distinction), and Louisiana has definitely rejected the Common Law test of the reservation of a reversion.

The Circuit Court of Appeals has rejected the view that *Logan v. State Gravel Co., 158 La. 105,* and *Board of Commissioners v. Pure Oil Co., 167 La. 801,* sustain the proposition that in Louisiana royalty under an oil and gas lease is rent, saying that royalty under an oil and gas lease is not always rent, but may be part of the purchase price.

The Supreme Court of Louisiana, in the *Roberson v. Pioneer Gas Co.* case, takes a diametrically opposite view of that jurisprudence. We quote from that opinion:

> "The reason why an obligation to pay an overriding royalty, or excess royalty, in a transfer of a

> lease, in whole or in part, and even though the transaction be called an assignment or a sale of the lease, characterizes the transaction as a sub-lease, and not merely an assignment, is that, in oil and gas leases, under the settled jurisprudence of this state, the payment of a royalty is the payment of rent, and is not the payment of a price for the oil or gas rights, as if they were sold. See Spence v. Lucas, 138 La. 763, 70 So. 796; Logan v. State Gravel Co., 158 La. 105, 103 So. 526; Board of Commissioners of Caddo Levee District v. Pure Oil Co., 167 La. 801, 120 So. 373."

This is the last expression of the Supreme Court of Louisiana on the subject, and is the re-statement of a doctrine which has been announced in every case in which that Court has had to consider the nature of royalty.

The Circuit Court of Appeals has sought to distinguish *Logan v. State Gravel Co.*, and *Board of Commissioners v. Pure Oil Co.*, both *supra*, from the case here, on the supposition that no consideration other than royalty was stipulated in either of those cases. It affirmatively appeared that a bonus was paid in *Board of Commissioners v. Pure Oil Co.;* and it is moreover the settled law of Louisiana that an oil and gas lease must be supported by a serious consideration, or an absolute obligation to drill, the obligation to pay royalty, when and if produced, unsupported by other serious considerations, being insufficient consideration for a lease. The jurisprudence on that point is noted in *Cali v. National Linen Service Corporation, 38 F. (2) 35.*

The Circuit Court of Appeals also construed the *Logan* and *Board of Commissioners* cases to hold that the

royalty in each case was rent, because the relationship of landlord and tenant existed.

In *Logan v. State Gravel Co., supra,* the Supreme Court of Louisiana held the relationship of landlord and tenant to exist because the royalty was rent; and in *Board of Commissioners v. Pure Oil Co., supra,* that Court applied the prescription relating to the arrearages of rent, in an action for unpaid royalties under an oil and gas lease, because the royalty was rent.

The only other reference made by the Circuit Court of Appeals to Louisiana jurisprudence is to be found in *Herold v. Commissioner, 42 F. (2) 942,* where it is said ". . . and *Wilkins v. Nelson, 155 La. 807, 99 So. 607,* also holds that royalty may form a part of the consideration paid for mineral rights". That case is not authority for the proposition that royalty may form part of the purchase price of a sale. The contract involved provided for a cash consideration of $900.00 and a royalty of one-eighth of the oil. In *Wilkins v. Nelson, 161 La. 439,* the Supreme Court of Louisiana, referring to the same contract, said "At the outset, it may be well to note that the mineral contract in question was declared to be a lease in *Wilkins v. Nelson, 155 La. 810; 99 So. 607. . . .*"

In its opinion below, the Circuit Court of Appeals referred to its decision in *Pugh v. Commissioner, 49 F. (2) 76.* We are not able to see the applicability of that case to the one now before this court. The parties in the Pugh transaction were dealing with their property from an entirely different point of view. In that case the taxpayer,

Pugh, had previously executed an oil and gas lease, affecting his property in Louisiana. Subsequently he sold one-half of his royalty in language quoted by the court as follows:

> "Omitting the formal and descriptive parts and italicizing significant words, it reads: 'J. C. Pugh has this day sold to J. M. Eastham . . . one-half of his one-eighth royalty on the following property. . . . This sale and transfer is made for the price and sum of $250,000.00; $50,000.00 of which is paid in cash and the balance of $200,000.00 is to be paid out of one-half of the royalty herein conveyed to the said Eastham, the said Pugh to receive the entire royalty of one-eighth until the said unpaid balance of $200,000.00 has been paid out of the one-half belonging to the said Eastham, and thereafter, the said one-half shall be paid to the said J. M. Eastham and his assigns. . . .'"

Clearly, what Pugh transferred was one-half of his right to receive rent under an oil and gas lease previously executed with some other person. The thing sold or assigned was royalty, and not a lease and the price was a fixed and certain sum of money to be paid in cash and out of oil. A lease was not the subject matter of the transfer.

In the case here before the court, the Circuit Court of Appeals has followed its former decisions and said that the overriding royalty was part of the purchase price. This conflicts with the provisions of *Articles 2439, 2464 and 2671 of the Revised Civil Code of Louisiana*, which provide, in part, as follows:

> "*Article 2439.* The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself."

"*Article 2464.* The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange."

"*Article 2671.* (Under Title IX, of Lease). The price should be certain and determined by the parties, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased."

The doctrine of *Logan v. State Gravel Co., supra,* is founded on this distinction. The Supreme Court of Louisiana in that case said:

> "But there are two ways in which that incorporeal right may be dealt with, viz: (1) It may be sold outright as may a 'servitude' or any other incorporeal thing (R.C.C. 2449), or (2), the land may be leased for mining purposes for a fixed rental or on a royalty basis (R.C.C. Art. 2671)."

It may be well to note that the Smitherman-Ohio sub-lease required the sub-lessee to pay over and deliver "the equal one-eighth (1/8) of oil produced and saved from the above described premises as an excess royalty" (R. 33); and the Baird-Gulf sub-lease required the sub-lessee to deliver to Baird "one twenty-fourth royalty out of oil . . . until the expiration of three years from this date, and a royalty of one thirty-second of all oil that may be saved from that produced after said date . . . " (R. 317).

The failure of the sub-lessees to pay these overriding royalties would have given the sub-lessors the right to

peremptorily cancel the sub-leases. *R.C.C. 2712* and *Louisiana Oil Refining Corporation v. Cozart, 163 La. 90.*

The trial court found as a fact that it was the intention of the parties to the Smitherman-Ohio transaction to effect a sub-lease. (Record 49).

Under the Civil Code of Louisiana, and the interpretative jurisprudence of the Supreme Court of Louisiana, the excess royalties involved in this case could only be rent, and being rent, the transfers could only be sub-leases.

CONCLUSION.

The decision of the Court of Appeals as we have shown in effect disapproves of Art. 215 (a) of the Regulations of the Department as amended by Treasury Decision 3938. The regulation is reasonable and proper and should not be interfered with unless clearly unlawful. In its disapproval of the regulation, the opinion of the court of Appeals is in direct conflict with the decision of the Ninth Circuit in the *Murphy Oil Co.* case *(55 F. (2d) 17)* thereby causing great uncertainty and confusion in the administration of the income tax laws. The question is one which apparently has never been decided by this court and in view of the existing conflict should be reviewed and settled.

The decision of the Circuit Court of Appeals is also in conflict with the jurisprudence of the State of Louisiana. The Circuit Court of Appeals has held that the transfers from Smitherman to the Ohio Oil Co. and from Baird to

the Gulf Refining Co. were sales or assignments and were not sub-leases. In its decision, the court has ignored the finding of the District Court that the transfers were Louisiana contracts governed by Louisiana law and has disregarded the decisions of the Supreme Court of Louisiana holding that such contracts are sub-leases and not sales or assignments. In so holding, the Circuit Court of Appeals has decided a question of local law contrary to the settled jurisprudence of the State of Louisiana.

We respectfully submit that this petition should be granted in order that this Honorable Court may review the questions herein presented and in due course reverse the decision of the Circuit Court of Appeals.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1932

No. 215

E. G. PALMER, Petitioner,

versus

MRS. AGNES B. McGRAWL BENDER, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER TO OPPOSITION OF RESPONDENT.

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May It Please the Court:

This cause is pending here on petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Fifth Circuit. Respondent has filed a brief in opposition, to which we desire to make this short reply.

Respondent has discussed the applicable jurisprudence of Louisiana from the standpoint of the common law theory of lease, and its distinction between assignment and sub-lease. This is a basic error, because there is a fundamental difference between the common law and civil law theories of lease. Common law authorities are inappropriate in a discussion of Louisiana leases *(Viterbo v. Friedlander, 120 U. S. 707)*, and for that reason the cases from states other than Louisiana, cited in respondent's opposition, are wholly inappropriate.

The decisions of the United States Circuit Court of Appeals for the Fifth Circuit, in *Waller v. Commissioner, 40 F. (2) 892*, and *Herold v. Commissioner, 42 F. (2) 942*, are in direct conflict with the jurisprudence of Louisiana, reaffirmed in *Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46*, subsequently decided. The Circuit Court of Appeals, in deciding the present case refused to follow *Roberson v. Pioneer Gas Co.*, saying the point was not at issue. Respondent so argues here.

In *Roberson v. Pioneer Gas Co., supra*, as pointed out in our original brief, it was necessary to decide whether the instrument in question was a sub-lease or assignment, in order to determine the effect of drilling under that transfer on a part of the premises covered by the original lease. The doctrine of *Roberson v. Pioneer Gas Co., supra*, is not revolutionary; it is the logical statement of Louisiana jurisprudence of sound juridical foundation, which has developed in this manner.

The Revised Civil Code provides:

"Article 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent."

"Article 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.

"It ought to consist of a sum of money, otherwise it would be considered as an exchange."

"Article 2671, under Title IX of Lease. The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased."

These articles have come down to us in almost identical language from the Code of 1808, through the Code of 1825. Their origin is to be found in the Civil Law of France, Spain and Rome from which the Civil Code is principally derived.

Based on these articles, the Supreme Court of Louisiana has universally held mineral contracts on a royalty basis to be leases. *Spence v. Lucas, 138 La. 763; Wilkins v. Nelson, 155 La. 807; Wilkins v. Nelson, 161 La. 437.*(1)

(1) Respondent has cited Wilkins v. Nelson, 155 La. 807, to support his contention that royalty may not be rent, but part of the purchase price. In Wilkins v. Nelson, 161 La. 437, construing the identical contract, the Supreme Court said: "At the outset it may be well to note that the mineral contract in question was declared to be a lease in Wilkins v. Nelson et al, 155 La. 810, 99 So. 607, the plaintiff in that case having attempted, unsuccessfully, to annul said contract for lesion, alleging that it evidenced a sale of the oil and gas beneath the surface of the land."

Following these cases, and based squarely on the Codal articles, the Supreme Court of Louisiana held that the lessor was entitled to a lessor's lien and privilege for unpaid royalty, because royalty was rent. *Logan v. State Gravel Co., 158 La. 105.*

Next the Supreme Court of Louisiana held that oil royalty under an oil and gas lease was rent and subject to the prescription of three years under Revised Civil Code, Article 2538, relating to arrearages for rent. *Board of Commissioners v. Pure Oil Co., 167 La. 801.*

In *Smith v. Sun Oil Co., 165 La. 907*, it was necessary to decide whether an instrument transferring part of a lease was a sub-lease or assignment, in order to determine the effect of drilling on the part of the lease affected by that instrument. The decision in that case contains a precis of the French authorities on the question, all of whom agree that an assignment is a sale and that a sub-lease is a lease.

In that case, the Supreme Court of Louisiana used the term "reversion" in referring to a right which would have existed, without having been expressly stipulated, under the articles of the Civil Code relating to the resolutory condition in all contracts, and to leases in particular. (See *Arts. 2046, 2711, 2712 and 2729, Rev. Civ. Code*).

Of course the Court did not mean to use the term "reversion" in the technical sense with which that word is used in common law to distinguish sub-leases from assignments. The Board of Tax Appeals in the *Waller* case *(16 B. T. A. 574)* and the Circuit Court of Appeals in both

the *Waller* and *Herold* cases *(Waller v. Commissioner, 40 Fed. (2) 892; Herold v. Commissioner, 42 Fed. (2) 942)* seized upon this term, and construing it in the light of the common law, rushed to the incorrect conclusion that Louisiana civil law and the common law were the same with respect to this distinction.

Roberson v. Pioneer Gas Co., supra, wherein the Supreme Court of Louisiana found it necessary to distinguish between sub-lease and assignment, in order to determine the effect of the transfer of part of an oil and gas lease, very properly explained that its use of the term "reversion" in *Smith v. Sun Oil Co., supra,* was not meant to connote the technical common law meaning of that term.

The same Circuit Court of Appeals held *Roberson v. Pioneer Gas Co., supra,* to establish a rule of property in Louisiana *(Harrell v. United Carbon Co., 52 F. (2) 790),* which it was bound to follow under *Griffey v. Smith, 237 U. S. 101.*

The Circuit Court of Appeals has followed the conclusion of *Roberson v. Pioneer Gas Co., supra,* in that case, and here has declined to follow the premise which that same Court established in order to reach that conclusion. Its decision in the case now before the Court is therefore necessarily in conflict with the entire jurisprudence of Louisiana on the subject, and we respectfully urge that the error should be corrected here.

The other cases cited in respondent's brief in opposition are not even remotely in point, and we shall not discuss them here. The entire jurisprudence of Louisiana

on the question involved in this suit, has been cited in our original brief. That jurisprudence is logical and consistent and sustains the contention of petitioner.

As we have done before (but without response), so do we now challenge respondent to cite one Louisiana case or one Codal provision in conflict or inconsistent with petitioner's position in this case; or to cite one Louisiana case or one Codal provision which even remotely upholds the decision of the Circuit Court of Appeals or respondent's position in this case.

The principle of bonus depletion was recognized by the Circuit Court of Appeals for the Ninth Circuit in *Murphy Oil Co. v. Burnet, 55 Fed. (2) 17* (Certiorari granted May 31, 1932, No. 955 of the Docket of this Honorable Court). In this case the Circuit Court of Appeals came to a contrary conclusion. The facts were essentially the same, except that the "basic date" for revaluation in the *Murphy* case was March 1, 1913, the lease having been previously acquired, and here the "basic date" is March 30, 1921, the date of discovery of oil.

The provisions of the Revenue law and regulations under which petitioner seeks refund do not in any manner apply to the Ohio Oil Company, and Gulf Refining Co., sub-lessees, for their depletion is based on cost, their rights having been acquired after March 1, 1913, and after discovery.

We have fully covered the question of the validity of the appropriate Revenue laws and regulations upon which petitioner relies, in our original brief.

The Government, in respondent's opposition in this Court, has denied for the first time in this protracted litigation that the Revenue laws and regulations involved apply to sub-lessors.

In the *Waller* case, in the Board of Tax Appeals *(Waller v. Commissioner, 16 B. T. A. 574)* the Government conceded that if the transfer involved was a sub-lease, petitioner would be entitled to depletion under T. D. 3938 (C. B. V.-2, p. 117).

In its brief in the Circuit Court of Appeals in this case, respondent said that "under the applicable statutes and Treasury Department (pp. 16 and 18, *supra*) a lessor, including a sub-lessor, of mining property is entitled to a deduction from income on account of depletion."

That is clearly correct, because, under Louisiana law, a sub-lease is a new lease, superimposed on the primitive lease, and one in which the original lessee becomes the lessor. *(Smith v. Sun Oil Co., supra).*

The petitioner had a 7/8ths interest in the property at the time of the discovery of the well. By the terms of the instrument in question he subleased to the Ohio Oil Company, retaining a valuable property right and interest in the form of a 1/8th overriding royalty. At all times the petitioner had a valuable interest in the property. This Court in *Lynch v. Alworth-Stephens Company, 267 U. S. 364*, dealing with the rights of sublessors held that an allowance for exhaustion of ore deposits "is to be made to everyone whose property right and interest therein have been depleted" * * *

The trial judge would have decided in favor of petitioner on all questions at issue, but that he felt constrained to follow *Waller v. Commissioner, 40 Fed. (2) 892*, and *Herold v. Commissioner, 42 Fed. (2) 942.* (R. p. 98).

The Circuit Court of Appeals has decided a question of local Louisiana law contrary to the established jurisprudence of Louisiana. It has in effect denied the validity of article 215 (a) of the Regulations of the Department as amended by Treasury Decision 3938. Its decision is in conflict with the decision of the Circuit Court of Appeals of the Ninth Circuit in *Murphy Oil Co. v. Commissioner (55 Fed. (2) 17).*

We respectfully submit that this petition should be granted in order that this Honorable Court may review the questions presented and in due course reverse the decision of the Circuit Court of Appeals.

All of which is respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 215.

E. G. PALMER,

Petitioner,

versus

MRS. AGNES McGRAWL BENDER, Administratrix of the Estate of Jacob O. Bender, Late Collector of Internal Revenue for the District of Louisiana,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

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November 19, 1932.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 215.

E. G. PALMER,
Petitioner,

versus

MRS. AGNES McGRAWL BENDER, Administratrix of the Estate of Jacob O. Bender, Late Collector of Internal Revenue for the District of Louisiana,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

1.

Opinions Below.

The opinion of the United States District Court for the Western District of Louisiana (R. 98) is reported in 49 F. (2d) 316. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 424) is reported in 57 F. (2d) 32.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 26, 1932 (R. 425). A petition for rehearing was submitted on April 12, 1932, and denied April 23, 1932. The petition for certiorari was filed July 12, 1932, and granted October 17, 1932 (R. 430). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III.

Summary Statement of the Case.

Petitioner brought this suit in the District Court for the Western District of Louisiana, to recover additional income taxes assessed against and paid by him, for the years 1921 and 1922, on account of his interest in two partnerships, the J. E. Smitherman, Special Account, and the George O. Baird partnership. That court denied recovery on the issues now before this Court and he appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the lower court.[1] A rehearing was applied for and refused. Petition for a writ of certiorari was granted by this Court on October 17, 1932.

The case was tried to the court (R. 26), and submitted upon stipulations and agreed statements of evidence (R. 92,

---

[1] One issue, not involved here, was decided in petitioner's favor (R. 115-116, 127), and respondent took a cross appeal (R. 375, 379). The judgment was affirmed (R. 424), 57 F. (2d) 32. Respondent did not ask for a rehearing, or petition this court for a writ of certiorari.

178, 320, 322, 324, 335). The trial court made special findings of fact and conclusions of law on the requests of both petitioner (R. 28, 59) and respondent (R. 61).

The partnership, J. E. Smitherman, Special Account, formed in 1919, acquired oil and gas leases on 26,000 acres of land near Haynesville, Louisiana, in the name of J. E. Smitherman, in whose name all subsequent contracts were made (R. 29-30).

During 1919, 1920 and 1921, several wells were drilled, but no oil was discovered until March 30, 1921, when a producing well was completed, in a discovery area, located on four of the leases (Exhibits "H" (R. 198); "I" (R. 204); "J" (R. 209), and "K" (R. 213) (R. 31)). On April 23, 1921, the partnership transferred to the Ohio Oil Company 120 acres of the 160 acres on which the well was located, by an instrument in writing (Exhibit N, R. 31-33, 242).

The consideration for that transaction was $3,000,000 cash, $1,000,000 out of one-half of the first oil produced and saved from the leased premises and the further obligation of the Ohio Oil Company to pay over and deliver to Smitherman "the equal one-eighth (⅛) of all oil produced and saved from the above described premises as an excess royalty." . . . The recited consideration of $3,000,000 was paid by the Ohio Oil Company, and the partnership subsequently received the additional $1,000,000 provided for in that agreement (R. 74).

In 1919, the George O. Baird partnership, through George O. Baird, acquired an oil and gas lease on a then unproven area in Claiborne Parish, Louisiana, on which it drilled a well which resulted in the discovery of oil on August 23, 1919. The Commissioner of Internal Revenue recognized the partnership as discoverer under the Revenue

Act then in force (R. 92-94) and the depletion unit established on the fair market value of the property at the date of discovery.

On November 16, 1921, Baird, acting for the partnership, made an agreement with the Gulf Refining Company of Louisiana, which was embodied in a written contract (Exhibit "Y," R. 313). The Gulf Refining Company under the terms of the agreement obligated itself to loan the Baird partnership $350,000,[2] to pay it $325,000 by delivering 60% of the oil produced from the property, and in addition to deliver to it for a term of three years "one twenty-fourth (1/24) of all of the oil that may be saved from that produced from the said property," and after three years "a royalty of one thirty-second of all the oil that may be saved from that produced . . . as long thereafter as oil may be produced from the said property in paying quantities" (R. 313-317).

In 1921 and 1922, petitioner reported as income his distributive share of the income of the Smitherman partnership, taking deductions for depletion based on the valuation of the property on the date of discovery, or within thirty days thereafter, against the bonus of $3,000,000 cash, and the $1,000,000 paid out of one-half of the oil. The Commissioner of Internal Revenue disallowed the deduction on the theory that the transaction with the Ohio Oil Com-

---

[2] This $350,000 was paid by the Gulf Refining Company to one Munhall, assignee of J. Rogers Flannery (R. 96), as a condition precedent to repossession of the leased premises under a judgment (Exhibit "X," R. 290, 309) resolving a prior sale of the lease made by the partnership to Flannery (Exhibit "W," R. 300). The Commissioner of Internal Revenue included this amount in income of the partnership. In this suit, the trial court decided that it should be excluded (R. 115-116), and rendered judgment accordingly (R. 127). It is not now involved here, as previously explained (Note 1, p. 2, *ante*).

pany was a sale and not a sub-lease (R. 51-54) (Exhibit "C," R. 182). Petitioner also reported as income for 1921 and 1922, his distributive share of the income of the Baird partnership, claiming a deduction for depletion on account of discovery value against that part of $325,000 payment in oil from the contract with the Gulf Refining Company. This deduction was also disallowed by the Commissioner for the same reasons (Exhibit "F," R. 188; R. 52-54, 90).

This resulted in the determination of a deficiency in petitioner's tax (R. 195-198). The amount of the deficiency, interest added, was assessed against petitioner and paid by him under protest (R. 154-155). This suit was brought to recover the amount so paid.

IV.

Specifications of Error.

Errors assigned by petitioner to be relied on are:

(1)

That the United States Circuit Court of Appeals erred in disapproving Article 215 (a), Treasury Regulations 62, as amended by Treasury Decision 3938.

(2)

That the said court erred in not holding that Article 215 (a), Treasury Regulations 62, as amended by Treasury Decision 3938, constitutes a proper interpretation and application of the depletion provisions of the 1921 Revenue Act.

(3)

That the said court erred in not holding that petitioner, as a member of the Smitherman partnership and Baird partnership, was entitled to depletion deductions in 1921 and 1922 with respect to the bonuses or advanced royalties received by those partnerships.

(4)

That the said court erred in denying petitioner's claim for refund, which claimed refund was based on depletion deductions with respect to the bonuses or advanced royalties received by the partnerships.

(5)

That the said court erred in holding the contract between James E. Smitherman and the Ohio Oil Company, dated April 23, 1921 (Exhibit "N", R. 242), and the contract between George O. Baird and the Gulf Refining Company, dated November 26, 1921 (Exhibit "Y," R. 313), to be sales or assignments, and in not holding them to be sub-leases.

(6)

That the said court erred in not construing those contracts according to the Civil Law of Louisiana, as distinguished from the Common Law, and in not following the jurisprudence of Louisiana as reaffirmed in *Roberson* v. *Pioneer Gas Co.*, 173 La. 313, 137 S. Rep. 46.

(7)

That the said court erred in not giving effect to the doctrine of *Roberson* v. *Pioneer Gas Company, supra,* as to the distinction between sub-leases and assignments.

(8)

That the said court erred in holding the over-riding or excess royalty respectively reserved by Smitherman and Baird in the aforesaid contracts to be part of the purchase price of a sale.

(9)

That the said court erred in not holding such excess royalties to be rent, as established by the Revised Civil Code of Louisiana and the jurisprudence of the Supreme Court interpretative thereof; and particularly Revised Civil Code, Articles 2439, 2464, and 2671, and *Logan* v. *State Gravel Co.,* 158 La. 105; *Board of Commissioners* v. *Pure Oil Co.,* 167 La. 801; *Wilkins* v. *Nelson,* 161 La. 437.

(10)

That the said Court erred in holding the failure of the Ohio Oil Company and the Gulf Refining Company to respectively pay Smitherman and Baird the over-riding or excess royalties retained by them would not entail forfeiture of the rights of the Ohio and Gulf companies under the said contracts; which ruling of the court is in direct conflict with the Revised Civil Code of Louisiana and the interpretative jurisprudence of the Supreme Court of Louisiana, particularly, Revised Civil Code, Article 2712, and *Louisiana Oil Refining Corporation* v. *Cozart,* 163 La. 90.

(11)

That the said court erred in holding that even if the instruments in question constituted sub-leases, the petitioner, as a member of the Smitherman and Baird partnerships, discoverers of the oil wells in question, would not be entitled to depletion deductions based on discovery revaluation, said deductions to be taken against the bonuses or advanced royalties received.

(12)

That the Circuit Court of Appeals erred in not reversing the decree of the District Court and in not remanding the case with instructions to render judgment in favor of the petitioner as prayed for.

V.

Argument.

Summary.

Section 214 (a) (10), Revenue Act of 1921, provides in part as follows:

> (a) That in computing net income there shall be allowed as deductions:
>
> (10) In the case of mines, oil and gas wells, . . . a reasonable allowance for depletion . . . according to the peculiar conditions in each case . . . : Provided, further, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially dis-

> proportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; . . . In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

The trial court found as facts that the Smitherman partnership drilled the discovery well on the leases involved (R. 31); that the total area, up to the date of discovery, was developed solely by the partnership and not as a result of the purchase of a proven tract or lease (R. 51); that the fair market value of the discovery area at date of discovery or within 30 days thereafter was $6,371,500, of which $5,200,000 represented the fair market value of the property affected by the transaction with the Ohio Oil Company (R. 50); and that such fair market value was disproportionate to the cost (R. 51).

The right of the Baird partnership to depletion based on discovery value was recognized by the Commissioner of Internal Revenue (R. 92-94).

The Regulations of the Treasury Department in existence at the time of the Smitherman-Ohio transaction (Article 215 (a), Regulations 45, 1920 Edition) provided for depletion deductions by a lessor against a bonus or other sum received in addition to royalties.

Article 215 (a) of Regulations 62 applying the 1921 Revenue Act was identical.

In November, 1926, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, amended Article 215 of Regulations 45, and Article 215 of Regulations 62, by Treasury Decision 3938, V-2 C. B. 117, which, in part, is as follows:

> (a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to the proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of the royalties thereafter received.

Petitioner contends that a sub-lessor is likewise entitled to the benefits of the depletion deductions provided for by the Revenue Act under the rules and regulations prescribed by the Treasury Department (*Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364).[3] That is particularly true in Louisiana, where a sub-lease is in all respects a new lease ingrafted on the primitive lease (*Smith* v. *Sun Oil Co.*, 165 La. 907; *Roberson* v. *Pioneer Gas Co.*, 173 La. 313).

Petitioner contends that the Smitherman transaction with the Ohio Oil Company and the Baird transaction with the Gulf Refining Company effected sub-leases, and are within the intendment of the cited provisions of the Revenue Act and Treasury Regulation, because they provided

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[3] Respondent has never seriously denied this proposition. In the *Appeal of L. T. Waller*, 16 B. T. A. 574, involving the identical Smitherman-Ohio Oil Company transaction, the Government conceded that if the transfer was a sub-lease petitioner would be entitled to depletion. In this case, in the Circuit Court of Appeals, respondent's brief stated that "under the applicable statutes and Treasury Department Regulations . . . a lessor, including a sub-lessor, of mining property is entitled to a deduction from income on account of depletion" (Brief 24). For the first time in the history of this litigation, respondent has mildly suggested in the brief filed here in opposition to the petition for certiorari that the Revenue Act and Regulations do not apply to sub-lessors.

for the payment of royalties in addition to the payment of bonuses. That is particularly true in Louisiana, where royalty under an oil and gas lease is considered to be rent (*Logan* v. *State Gravel Co.*, 158 La. 105; *Board of Commissioners* v. *Pure Oil Co.*, 167 La. 801); and where the stipulation for a new rental in the transfer of a lease (as, for example, the provision for an excess royalty in the transfer of an oil and gas lease) characterizes the transfer as a sub-lease and not as a sale (*Smith* v. *Sun Oil Co.*, 165 La. 907; *Roberson* v. *Pioneer Gas Co.*, 173 La. 313).

The Circuit Court of Appeals considered the transactions to be assignments or sales, and not sub-leases; and stated that even if sub-leases, petitioner would not be entitled to depletion deductions in language which was tantamount to holding that the Treasury Regulation is not a reasonable interpretation of the Revenue Law providing for depletion deductions on discovery valuation.

Questions Presented.

There are, therefore, presented these questions:

1. Is Article 215 (a) of Treasury Regulations 62, as amended by Treasury Decision 3938, providing for allowances for depletion based on bonus received in addition to royalties, a reasonable and proper application of Section 214 (a) of the Revenue Act of 1921?

2. Is a sub-lessor entitled to deductions for depletion on the bonus he receives in addition to royalties under Section 214 (a) of the Revenue Act of 1921, and Article 215 (a) of Treasury Regulations 62, as amended?

3. Were the transfers of the oil and gas leases from Smitherman to the Ohio Oil Company and from Baird to the Gulf Refining Company sales (assignments) or subleases?

ARGUMENT.

I.

Article 215 (a) of Treasury Regulations 62, as amended by Treasury Decision 3938, providing for allowances for depletion based on bonuses or other sums received in addition to royalties, is a reasonable and proper application of Section 214 (a) of the Revenue Act of 1921.

The Circuit Court of Appeals in this case held, in effect, that Article 215 (a) of Treasury Regulations 62, as amended by Treasury Decision 3938, providing for allowances for depletion based on bonus received by a lessor in addition to royalties, is not a reasonable or proper application of Section 214 (a) of the Revenue Act of 1921. It denied petitioner's right to depletion based on the bonus or advanced royalties, saying, in part (R. 425; 57 F. (2d) 32, 35):

> It is not reasonable to suppose that either the Ohio Oil Co. or the Gulf Refining Co. should surrender the benefit of the depletion allowance on $4,000,000 in the one case and $325,000 on the other.

Later in the opinion it is stated:

> It is almost inconceivable that it was the intention of Congress to withhold an allowance for depletion from the operator of an oil and gas lease who produces all the oil and upon the production of which

> he owns the greatest portion, and grant it to the holder of an overriding . . . royalty.

These reasons for holding the Regulation invalid are unique, and are obviously inconsistent with Section 214 (a) (10) of the Revenue Act of 1921.

The Ohio Oil Company and the Gulf Refining Company acquired proven leases after March 1, 1913. Not being discoverers, the basis for the depletion to which they are respectively entitled is cost (see Article 203 (d), Regulations 62). On such basis the Ohio Oil Company was entitled to depletion on three-fourths of the oil produced from the date of the sub-lease. Neither the statute nor the regulation withholds the allowance from the operator of an oil property and grants it to the holder of an over-riding royalty, as the court below indicates. The Ohio Oil Company is entitled to depletion on all of its share of the oil, but its depletable base is measured by its cost. By its sublease, the Ohio Oil Company acquired a proven territory, which excludes it from the category of discoverers.

The Smitherman and Baird partnerships, being discoverers, are entitled to depletion based on fair market value on the date of discovery, or within 30 days thereafter (Section 214 (a) (10), Revenue Act of 1921). The petitioner here is asking for depletion only on the bonus payments, depletion on the one-eighth excess royalty having heretofore been allowed by the Commissioner.

It is obvious that the depletion allowances are wholly independent, and that the allowance of depletion based on discovery valuation to the Smitherman and Baird partnerships could not possibly deprive the Ohio and Gulf Companies, who acquired their rights after discovery, of their rights to depletion based on cost.

In *Murphy Oil Co.* v. *Burnet*, 15 B. T. A. 1195, the Board of Tax Appeals disapproved the Regulation in question on an entirely different ground. It held that the depletion deduction can only be measured by the oil produced, and that the allowance of depletion against bonuses or advanced royalties is a departure from the depletion concept.

The Circuit Court of Appeals for the Ninth Circuit reversed the Board of Tax Appeals and expressly approved the identical regulation (55 F. (2d) 17), saying, in part:

> The regulation is not only not in conflict with the statute, but directly conforms thereto,

and reversed the Board.

Certiorari was granted (286 U. S. 541), and the Murphy Oil Co. is asserting in this Court the invalidity of the Regulation on the grounds assigned by the Board of Tax Appeals for its decision.

In the *Murphy* case the "basic date" for valuation for depletion purposes was March 1, 1913, the property having been acquired by the lessor prior to that date. In this case the "basic dates" for valuation for the same purpose are the dates of the discovery of oil by the Smitherman and Baird partnerships, who were sub-lessors, in the contention of petitioner.

In a recent opinion, this Court referred with approval to the Statute, Treasury Regulations and court decisions which establish depletion allowances against bonuses received by the lessor of mineral properties in addition to royalties.[4] While the question was not there presented pre-

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[4] *Burnet, Commissioner* v. *Harmel*, Number 26, October term, 1932, Opinion November 7, 1932, reversing *Harmel* v. *Commissioner*, 56 F. (2d) 153 (C. C. A. 5).

cisely as it is in this case, the effect of that decision is such as to require only a brief discussion of petitioner's contention that the amended Regulation in question is valid, and that only with respect to the contrary argument made in the *Murphy Oil Company* case, *supra.*

The legislative history of the depletion provisions of the Revenue Acts clearly demonstrates that Congress did not intend that depletion deductions should coincide with actual extraction. It is admitted that depletion from gross income on account of the extraction of the oil which produces the income is not allowed as a matter of right. *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114; *Burnet* v. *Thompson Oil and Gas Co.,* 283 U. S. 301. Its sanction is statutory.

Congress failed to make provision for any such deduction in the Corporation Excise Tax Act of 1909 (c. 6, 36 Stat. 112, Sec. 38), but, recognizing the hardship resulting from this omission because of the peculiar character of mineral properties, it provided for depletion deductions in the later Revenue Acts (*U. S.* v. *Ludey,* 274 U. S. 295, 303). In the Income Tax Section of the Tariff Act of October 3, 1913 (c. 16, Sec. II, 38 Stat. 114, 166-167) an allowance was made, the validity of which was sustained by this Court (*Stanton* v. *Baltic Mining Co., supra*).

In the case of oil and gas wells, the Revenue Act of 1916 (c. 463, 39 Stat. 756) provided for a "a reasonable allowance for actual reduction in flow and production" (Section 12 (a) Second).

Section 214 (a) (10) of the Revenue Act of 1918 provided in the case of oil and gas wells that there should be deducted from gross income "a reasonable allowance for depletion . . . according to the peculiar conditions in each

case. . . . Such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary."

This plenary delegation of authority has had the approval of this Court. In *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, this Court said:

> It is clear that Congress intended that the lessee of an oil well should be entitled to a reasonable allowance for depletion based upon cost or March 1, 1913, value. It did not, however, attempt to prescribe a formula for ascertaining it, but expressly delegated that function to the Commissioner of Internal Revenue, who was to make rules and regulations to that end.

The broad discretion thus given to the Commissioner does not indicate an intention to allow deduction for depletion only coincident with actual extraction. In the exercise of this discretion the Commissioner soon thereafter issued Regulations 45, Article 215 of which provided that where a lessor received annual minimum royalties, which entitled the lessee to actual extraction of the number of units paid for, a depletion deduction should be allowed the lessor based on the value in the ground of the units paid for by the minimum rental. This was a clear recognition of the right to depletion before actual extraction, and was in accordance with the fundamental purpose of the Revenue Act—to tax true annual net income.

In the 1920 edition of Regulations 45, Article 215 was enlarged so as to provide that a bonus paid to a lessor in addition to royalties should be regarded as a return of capital, but only to the extent of the capital remaining to be recovered by the lessor through depletion. The same

provision was retained in subsequent regulations.[5] On November 13, 1926, Article 215 (a) of Regulations 45 and 62 and 216 (a) of Regulations 69 were amended by T. D. 3938 so as to provide that when a lessor received a bonus in addition to royalties, a depletion deduction should be allowed with respect to the bonus to the extent of that proportion of the basic value which the bonus bore to the sum of the bonus and royalties expected to be received. This provision was continued in Regulations 74 (Art. 236 (a)) under the Revenue Act of 1928. The principle of depletion against bonus was not changed; the method of computing the deduction alone was affected.

The provision for depletion as it appeared in the Revenue Act of 1918 was continued without substantial change in the Revenue Acts of 1921, 1924, 1926, 1928, and 1932. Congress has five times substantially reenacted the depletion provisions of the Revenue Act, in a period of 13 years, during which the Treasury Regulations have consistently provided for a depletion deduction in advance of extraction. This is persuasive evidence of legislative approval of the Regulation, and amounts to implied legislative confirmation of such executive interpretation. See *U. S.* v. *Falk,* 204 U. S. 143; *U. S.* v. *Cerecedo Hermanos y Compañia,* 209 U. S. 337; *National Lead Co.* v. *U. S.,* 252 U. S. 140, 146-147; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235; *Brewster* v. *Gage,* 280 U. S. 327, 337; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301, 307-308; *U. S.* v.

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[5] Article 215 (a) and (b) of Regulations 62 under Revenue Act of 1921.

Article 216 (a) and (b) of Regulations 65 under Revenue Act of 1924.

Article 216 (a) and (b) of Regulations 69 under Revenue Act of 1926.

Kirby Lumber Co., 284 U. S. 1; *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552. This precludes any argument that the depletion deduction must be coincident with actual extraction.

The provision in the Regulations which treats bonus as advanced royalty and allows depletion against both bonus and royalty is fully justified because it is the only means by which the underlying purpose[6] of the Revenue Acts to tax true annual income can be fulfilled.

The depletion deduction is an allowance to compensate for partial exhaustion of mineral reserves. Gross income from the operation of mining property represents a return both for the use of capital, and for its exhaustion. Its nature has been so described by this Court (*U. S.* v. *Ludey*, 274 U. S. 295). So long as the mineral property is operated by the owner, or in cases where the lessor's only income is from royalty, the operation of depletion keeps step with actual exhaustion. The problem presented where the lessor receives both bonus and royalties is logically solved by the Regulation as amended by T. D. 3938.

When the lessor receives a bonus in addition to royalties, the bonus is an advanced or supplemental royalty,—a part of the royalty in a lump sum or down payment. It was so

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[6] This Court has repeatedly pointed out that that purpose is to tax true annual net income (*United States* v. *Anderson*, 269 U. S. 422; *Mitchell* v. *United States*, 271 U. S. 9; *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92; *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359). The purpose cannot be effectuated with respect to bonus payments unless they are treated as advanced royalties and an allowance made against them for depletion.

held by this Court in *Work* v. *Mosier*, 261 U. S. 352.[7] See also *Burnet* v. *Harmel*, No. 26, October term, 1932, U. S. Supreme Court; *Burkett* v. *Commissioner*, 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565; *Berg* v. *Commissioner*, 33 F. (2d) 641 (Ct. App. D. C.), certiorari denied, 280 U. S. 598; *Alexander* v. *King*, 46 F. (2d) 235, 239-240 (C. C. A. 10th), certiorari denied 283 U. S. 845; *Ferguson* v. *Commissioner*, 59 F. (2d) 891 (C. C. A. 10th); *Hirschi* v. *United States*, 67 Ct. Cls. 637, certiorari denied, 280 U. S. 576; *Appeal of Nelson Land & Oil Co.*, 3 B. T. A. 315, 326; *Cf. United States* v. *Biwabik Mining Co.*, 247 U. S. 116, 121.

That bonus is advanced royalty has been the basis for decisions requiring the lessee who has paid a bonus for a lease to distribute the deduction therefor as an expense over the entire life of the lease, because the bonus was an advance rental or royalty.[8]

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[7] In this case the Circuit Court of Appeals for the Fifth Circuit did not consider *Work* v. *Mosier* applicable because it involved the leasing of Indian lands. A similar error by that court with respect to the nature of bonus and royalty in oil and gas leases was recently corrected by this Court in *Burnet* v. *Harmel*, *supra*.

[8] It was so held:

By the Bureau of Internal Revenue:

Article 109, Treasury Regulations 45 and 62;
Article 110, Treasury Regulations 65 and 69;
Article 130, Treasury Regulations 74; I. T. 1711, II-2 C. B. 104; A. R. R. 6459, III-1 C. B. 138.

By the Board of Tax Appeals:

Nelson Land & Oil Co., 3 B. T. A. 315, 325-326; *Burkett* v. *Commissioner*, 7 B. T. A. 560, affirmed, 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565; *Hazlett* v. *Commissioner*, 10 B. T. A. 332, 337; *Parkey* v. *Commissioner*, 16 B. T. A. 441, 445; *Baton Coal Co.* v. *Commissioner*, 19 B. T. A. 169, affirmed, 51 F. (2d) 469 (C. C. A. 3d), certiorari denied, 284 U. S. 674; *Ferguson*

This view is sound because both bonus and royalties alike are consideration derived by the lessor from the use of property which is wasted in use. Depletion must be applied to income from the use of property which consumes it, and as to the lessor that income comes to him not merely as royalties but as bonus.

If depletion deduction is not applicable to bonuses received in addition to royalties, the taxpayer's income will be distorted so as to defeat the purpose of the Act to tax true annual income, because the entire amount of the depletion allowance will be applicable to the royalties on all oil as extracted, thereby allocating bonus to years when it is not received. Distortion would also result, because no depletion would be allowed against a bonus, which obviously represents a payment in advance for oil to be extracted.

The Regulation is, therefore, a proper and reasonable interpretation of the Revenue Act of 1921. Its application does not distort the taxpayer's income either in the year of the receipt of the bonus, or when the royalties are received. It carries out the basic intent of Congress to tax

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v. *Commissioner*, 20 B. T. A. 130, 131, reversed, 45 F. (2d) 573 (C. C. A. 5th); *Cf. Waggoner* v. *Commissioner*, 24 B. T. A. 657.

By the Courts:

Central Nat. Bank v. *United States*, 283 Fed. 368, 373 (C. C. A. 8th), dismissed, 264 U. S. 600; *Alland & Bro.* v. *United States*, 28 F. (2d) 792 (D. Mass.); *Hirschi* v. *United States*, 67 Ct. Cls. 637; *Burkett* v. *Commissioner, supra; Baton Coal Co.* v. *Commissioner, supra; Galatoire Bros.* v. *Lines*, 23 F. (2d) 676 (C. C. A. 5th). See *Constantine* v. *Wake*, 1 Sweeny (N. Y.) 239, 244; *Klein, Federal Income Taxation*, p. 439; *Crile* v. *Commissioner*, 55 F. (2d) 804 (C. C. A. 6th). *Cf. Jennings & Co.* v. *Commissioner*, 59 F. (2d) 33 (C. C. A. 9th).

true annual income. It is elastic, because the amount of depletion deduction varies as the proportion of the bonus to the sum of the bonus and royalties to be received varies. The amended Regulation is a valid interpretation of the Revenue Act of 1921.

II.

A sub-lessor is entitled to deductions for depletion on the bonus he receives in addition to royalties under Section 214 (a) (10) of the Revenue Act of 1921, and Article 215 (a) of Treasury Regulations 62, as amended.

Petitioner contends that a sub-lessor who receives a bonus in addition to royalties, is entitled to the depletion deductions allowed by Section 214 (a) (10) of the Revenue Act of 1921 on such bonus, although Article 215 (a), Regulation 62, as amended, only expressly mentions lessors.

The amended Regulation is based on the settled jurisprudence of this Court that where a lessor receives a bonus in addition to royalties, the bonus is an advance, or supplemental royalty—in effect, a part of the royalty in a lump sum or down payment. See *Work* v. *Mosier, supra; Burnet* v. *Harmel, supra.* Bonus and royalty are consideration for the lease and are income to the lessor.

A sub-lessor, who receives a bonus in addition to royalties, cannot be logically excluded from the benefit of the depletion provisions of the Revenue Act, and interpretative Regulation, merely because the Regulation expressly mentions only lessors. The Act itself does not evidence any intention to make such distinction, and the fact that a sub-

lessor receives bonus and royalties identical in character with those received by a lessor in leasing oil properties, brings him squarely within the intendment of the Act.

In *Lynch* v. *Alworth-Stephens,* 267 U. S. 364, the sub-lessor of mining property claimed deduction for depletion under the Revenue Act of 1916, on account of the royalties received under the sub-lease. This Court held that the sub-lessor would be so entitled, saying, in part:

> We agree with the Circuit Court of Appeals, 294 Fed. 194, that, "the plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made. . . . And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of a powerful intellect would discover."

No bonus was involved in that case, but if the sub-lessor be entitled to depletion deduction as to royalties under the Revenue Act and Regulations, then it necessarily follows that he is also entitled to such deductions with respect to the bonus he receives in addition to royalties, for it is but a part of royalty in a lump sum or down payment (*Work* v. *Mosier, supra; Burnet* v. *Harmel, supra*). That is particularly true in Louisiana, where a sub-lease is, in all respects, considered to be a new lease, the primitive lessee becoming lessor in the new or sub-lease, and where the relationship between the primitive lessee and the sub-

lessee is regulated by the rules of lease (*Smith* v. *Sun Oil Co.*, 165 La. 907).

The Commissioner has heretofore allowed deductions for depletion with respect to royalties received by the Smitherman and Baird partnerships (Exhibit "C," R. 182; Exhibit "F," R. 188; Opinion in C. C. A., R. 424, 428, 57 F. (2d) 32, 35).

That is consistent with the Government's admission in the *Waller* case (16 B. T. A. 424) and the concession in respondent's brief below in this case, to which reference has heretofore been made.

The right of a sub-lessor to depletion deductions under the Act and Regulations is apparent.

III.

The transfers here involved were sub-leases and not sales or assignments.

Although the transactions between Smitherman and the Ohio Oil Company, and Baird and the Gulf Refining Company, contain the elements essential to entitle the partnerships to depletion deductions, within the clear intendment of the Revenue Act and appropriate Treasury Regulations, since they both provide for the payment of royalties and bonuses, the Commissioner, while allowing depletion against the royalties received, has contended that the transactions were sales, and denied depletion against the bonuses.

Petitioner contends that the transactions were sub-leases because they provided for over-riding royalties payable in oil, for the reason that in Louisiana a sub-lease is

a new lease, characterized by new obligations flowing from the sub-lessee to the sub-lessor, such as the stipulation for a new rent; royalties, in Louisiana, being rent.

The Circuit Court of Appeals says that a sub-lease is characterized by the sub-lessor's retention of a "reversionary interest" in the lease; meaning a part of the term.

The two tests are incompatible. "Reversion," according to its common law connotation, is unknown in Louisiana and at civil law. Neither the reservation of a new rent for the entire term (35 C. J., p. 990), or the right of re-entry (16 R. C. L., p. 827), is sufficient to characterize the transfer of a lease as a sub-lease.

The decisions of the Circuit Court of Appeals upholding the Commissioner were rendered in *Waller* v. *Commissioner,* 16 B. T. A. 574, 40 F. (2d) 892, involving the Smitherman partnership; in *Herold* v. *Commissioner,* 17 B. T. A. 933, 42 F. (2d) 942, involving the Baird partnership; and in this case, involving both partnerships.

The opinion of the trial judge (R. 98) shows that his decision on this point was rendered only because he felt bound by the earlier decisions of the Circuit Court of Appeals, for the body of the opinion is entirely devoted to an exposition of his belief that petitioner was entitled to depletion and that the transactions effected sub-leases.

Subsequent to the decisions in the *Waller* and *Herold* cases, but prior to the decision of the Circuit Court of Appeals in this case, the Supreme Court of Louisiana decided *Roberson* v. *Pioneer Gas Co.,* 173 La. 313, which again affirms and restates the law of Louisiana respecting the transfer of oil and gas leases by sub-lease or by assignment precisely as contended by petitioner. On the touchstone of that decision the transfers ring true as sub-leases.

Seeking to break the force of that decision, the Circuit Court of Appeals said that it was "unable to agree that the question as to what constitutes a sub-lease as distinguished from an assignment was before the Supreme Court of Louisiana for decision."[9] With all deference, the doctrine of the *Roberson* case on the distinction between sub-lease and assignment is not dictum.

In the *Roberson* case it was absolutely necessary for the Supreme Court of Louisiana to determine the nature of the lease transfer involved, in order to determine its effect under *Smith* v. *Sun Oil Co.*, 165 La. 907, which held that the effect of a sub-lease was different from the effect of an assignment.[10]

We think the Circuit Court of Appeals has reached an incorrect conclusion in this case, because it has failed to recognize that there is a basic, fundamental difference between the common law conception of the nature of lease, and that of the civil law of Louisiana, inherited from the Civil Law of Rome, Spain, and France.

In *Viterbo* v. *Friedlander,* 120 U. S. 707, which is an epitome of the history of the Civil Code of Louisiana, this Court said:

> In considering this case, it is important to keep in mind that the view of the common law of England and of most of the United States, as to the nature of a lease for years, is not that which is taken by the Civil Law of Rome, Spain, and France, upon which the Civil Code of Louisiana is based.

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[9] In *Harrell* v. *United Carbon Co.*, 52 F. (2d) 790, the same court said that the *Roberson* case, with respect to effect of an assignment of part of a lease, established a rule of property which it was bound to follow under *Guffey* v. *Smith,* 237 U. S. 101.

[10] This is more elaborately argued at pages 36-37 of petitioner's brief in support of petition for certiorari.

> But as to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as a grant of an estate for years, which the lessee takes a title in. . . . (Citing cases.)
>
> The Civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property; . . . (Citing authorities.)

To the same effect is *Knapp* v. *Guerin*, 144 La. 761, where the Supreme Court of Louisiana, having before it an action for damages arising from the eviction of a tenant, said:

> We do not have to look to the common law for our guidance in the determination of the subject matter of this litigation, for it is governed by the provisions of the Civil Code derived from the Civil Law. For an able and elaborate discussion of the difference under the two systems see the case of Viterbo *v.* Friedlander, 120 U. S. 707.

The decision of the Circuit Court of Appeals in the *Waller* case, upon which its decision here is based, was postulated upon the following definition:

> An assignment of a lease occurs where a lessee parts with his entire interest in the demised premises or a part thereof for the unexpired term of the original lease, 16 R. C. L. 824, 826; 35 C. J. 988, 989. If the assignor convey less than his entire interest in the whole or a part of his lease, so that there still remains in him a reversionary interest, the transaction amounts to a sub-lease. 16 R. C. L. 826.

Clearly, that definition is inappropriate, since it is taken from common law sources, in support of which no Louisiana case is cited.

The Louisiana test by which sub-lease is to be distinguished from assignment, with particular reference to oil and gas leases, was restated in *Roberson* v. *Pioneer Gas Co., supra,* as follows:

> Our opinion, therefore, is that the transaction between the defendant and Pipes & Mack was merely an assignment of the lease on the 40 acres of land, and not a sub-lease. The reason for that is that the defendant thereby disposed absolutely of its interest in the lease on the 40 acres of land, and left no contractual relation whatever between the parties, or obligation on the part of the assignee in favor of the assignor. If the Pioneer Gas Company had retained an overriding royalty, or excess royalty, to be paid by Pipes & Mack to the Pioneer Gas Company, in addition to the one-eighth royalty to be paid by Pipes & Mack to the original lessors, the contract between the Pioneer Gas Company and Pipes & Mack would have been a sub-lease and not merely an assignment of the lease on the 40 acres of land. See Smith *v.* Sun Oil Company, 165 La. 907, 116 So. 379, and Johnson *v.* Moody, 168 La. 799, 123 So. 330. The distinction between an assignment of a lease and a sub-lease is that in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a sub-lease, the original lessee, or sub-lessor, retains an interest in the lease in so far as it affects the property sub-leased, by imposing some obligation upon the sub-lessee in favor of the sub-lessor, such as an obligation to pay additional rent to the sub-lessor. Robinson *v.* Freret, 9 La. Ann. 303; Audubon Hotel Co. *v.* Brauning, 120

> La. 1089, 46 So. 33, 124 Am. St. Rep. 456; Rev. Civ. Code, Art. 2725; Code Napoleon, Art. 1717; Baudry-Lacantinerie, Vol. 20, p. 616, Nos. 1052 and 1053; Beaudant, p. 374, Nos. 531 and 532; Marcade, Vol. 6, p. 112; Aubrey et Rau, Vol. 5, p. 336.

That test is logically founded on the Civil Law conception of the nature of sub-leases and assignments, according to which a sub-lease is a new lease, and governed by the laws relating to leases, while an assignment is a sale and governed by the laws relating to sales. In the case of a sub-lease two leases are superposed: the primitive lease, between the lessor and first lessee, and the sub-lease, between first lessee who becomes lessor, and the sub-lessee (*Smith* v. *Sun Oil Co.*, 165 La. 907).

To determine, therefore, whether there has been an assignment or a sub-lease of minerals, such as oil and gas, it is logically necessary to inquire how mineral rights in Louisiana may be sold or leased.

In Louisiana mineral rights may be dealt with in two ways: they may be sold, as any other property, or they may be leased for a fixed rental or on a royalty basis.

In *Spence* v. *Lucas*, 138 La. 763, wherein the Supreme Court of Louisiana was required to decide whether a mineral contract on a royalty basis was a sale or lease, it said:

> . . . Until the Legislature shall have passed laws specially applicable to the industry of mining, which is a new one in this state, the parties engaged in those pursuits *and the courts of the State will adhere to the jurisprudence on the subject and treat mineral contracts as* LEASES. (Italics and capitals ours.)

In *Logan* v. *State Gravel Co.*, 158 La. 105, after referring to the Louisiana jurisprudence that the grant of minerals

does not convey any specific corporeal thing, but only the right to extract them from the soil, in the nature of a servitude, the court said:

> But there are two ways in which that incorporeal right may be dealt with, viz: (1) It may be sold outright, as may "a servitude" or any other incorporeal thing (R. C. C. Art. 2449); or (2) the land may be leased for mining purposes for a fixed rental or on a royalty basis (R. C. C. Art. 2671),

and stated its conclusion to be:

> Our conclusion is that a mine or quarry on land adapted to mining or quarrying may be leased for a certain portion of the produce of such mine or quarry and the fact that said portion is called "royalty" instead of rent, is not of the least consequence. For "rent" (by whatever name called) is a certain profit in money, provisions, chattels or labor, issuing out of lands and tenements in retribution for the use.

That decision rests upon a basic difference between the consideration for a sale and the consideration for a lease. The consideration for a sale ought to consist of a sum of money; the consideration for a lease may consist in a portion of the fruits yielded by the thing leased. It is founded on the following Articles of the Civil Code:

> Article 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.
>
> Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent.

> Article 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.
>
> It ought to consist of a sum of money, otherwise it would be considered as an exchange.
>
> Article 2671 (under Title IX of Lease). The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.

And the court logically applied them to determine that the royalty under the mineral contract involved in *Logan* v. *State Gravel Co., supra,* was rent, for the payment of which the lessor was entitled to the lessor's privilege under Article 2705 of the Civil Code.

In *Board of Commissioners* v. *Pure Oil Co.,* 167 La. 801, a suit was brought for oil royalty due under an oil and gas lease. The court sustained a plea of prescription under Article 2538 of the Civil Code, which provides that the action for arrearages of rent prescribes in three years.

In each case the distinguishing test by which it was determined that the royalty was rent under a contract of lease was the nature of the royalty, that is, that it "consisted in a certain quantity of commodities or even in a portion of the fruits yielded by the thing leased." R. C. C. 2671.

The Circuit Court of Appeals thought there was a distinction between the transactions in those cases and the ones involved here, saying that there was no bonus paid in the *Logan* case, that the facts in *Board of Commissioners* case were practically the same, and that the royalty was held to be rent because the relationship of landlord and tenant existed (see *Waller* v. *Commissioner, supra*).

With all deference, that distinction does not exist. The opinion in *Board of Commissioners* v. *Pure Oil Co., supra,* affirmatively shows that a bonus was paid; it is the settled law of Louisiana that an oil and gas lease must be supported by a serious consideration in money, or an absolute obligation to drill in search of minerals,[11] and the transactions were held to be leases because the royalties stipulated were rent.

That is the foundation of the rule that the stipulation for an excess or overriding royalty in the transfer of an oil and gas lease characterizes it as a sub-lease. It is succinctly so stated in *Roberson* v. *Pioneer Gas Co., supra,* as follows:

> The reason why an obligation to pay an overriding royalty, or excess royalty, in a transfer of a lease, in whole or in part, and even though the transaction be called an assignment or a sale of the lease, characterizes the transaction as a sub-lease and not merely an assignment, is that, in oil and gas leases, under the settled jurisprudence of this state, the payment of a royalty is the payment of rent, and is not the payment of a price for the oil or gas rights, as if they were sold. See Spence *v.* Lucas, 138 La. 763, 70 So. 796; Logan *v.* State Gravel Co., 158 La. 106, 103 So. 526; Board of Commissioners of Caddo Levee District *v.* Pure Oil Co., 167 La. 801, 120 So. 373.

The excess or overriding royalties stipulated in the transactions here involved, measured by these tests, un-

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[11] It was so decided in *Murray* v. *Barnhart,* 117 La. 1023; *Anse La Butte Oil Co.* v. *Bobb,* 122 La. 415; *Girault* v. *Feucht,* 117 La. 275. See also *Cali* v. *National Linen Service Corp.,* 38 F. (2d) 35.

doubtedly were rent, and necessarily characterize the transactions as subleases.

The Smitherman transfer provided for the payment of $3,000,000.00 in cash, and $1,000,000.00 out of one-half of the first oil produced and saved from the premises, and required the Ohio Oil Company to pay over and deliver "the equal one-eighth (1/8) of all oil produced and saved from the above described premises as an excess royalty" (R. 33).

The Baird-Gulf transfer required the Gulf Refining Company, in addition to other payments and obligations under the contract, to deliver to him (Baird), or his transferees, the one-twenty-fourth royalty out of oil, as hereinabove provided, until the expiration of three years from this date, and a royalty of one-thirty-second of all oil that may be saved from that produced, after said date, and as long thereafter as oil may be produced from said property in paying quantities (R. 317).

The excess royalties are rent because they consisted "in a portion of the fruits yielded by the thing leased" (R. C. C. 2671, *supra*). They could not be sales because the price did not "consist of a sum of money" (R. C. C. 2464, *supra*).

The Circuit Court of Appeals considered *Smith* v. *Sun Oil Co.*, 165 La. 907, to hold that the retention of a "reversion," as that term is construed at common law, was necessary to characterize the transfer of a lease as a sublease. The Supreme Court of Louisiana, in *Roberson* v. *Pioneer Gas Co., supra,* completely demonstrates the fallacy of that conjecture. There the court said:

> In Smith v. Sun Oil Co. and in Johnson v. Moody, *supra,* we said that the obligation to pay an

> overriding royalty, in the contract, which, in each of those cases, the parties called an assignment, was imposed upon the so-called assignee "under penalty of reversion" to the original lessee, or sublessor; but we did not use the term "reversion" in the technical sense in which it is used at common law. The reversion which we had in mind was merely the reversion of the right of occupancy or use of the property; because a contract of lease under the civil law, unlike the common law in that respect, does not convey to the lessee, even temporarily, a title to the property leased, but conveys only the right to the use or enjoyment of the property. Rev. Civ. Code, Arts. 2669, 2674, Logan *v.* State Gravel Co., 158 La. 105, 103 So. 526.

The Circuit Court of Appeals, without the citation of authority, stated that the failure of the Ohio Oil Company to pay Smitherman the 1/8 over-riding or excess royalty would not deprive the company of its right to take the other seven-eighths. With all deference, that is not the law of Louisiana. The Civil Code provides:

> Article 2711. If the lessee makes another use of the thing than that for which it was intended, and if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease.
>
> The lessee, in that case, shall be bound to pay the rent, until the thing is again leased out; and the lessee is also liable for all the losses which the owner may have sustained through his misconduct.
>
> Article 2712. The lessee may be expelled from the property if he fails to pay the rent when it becomes due.[12]

---

[12] This article was applied in *Louisiana Oil Refining Corp.* v. *Cozart*, 163 La. 90, and a lease was dissolved and the lessee expelled for failure to pay the rent under an oil and gas lease.

> Article 2729. The neglect of the lessor or lessee to fulfill his engagements, may also give cause for a dissolution of the lease, in the manner expressed concerning contracts in general, except that the judge cannot order any delay of the dissolution.

The Circuit Court of Appeals stated that royalty in Louisiana was not always rent, and inappropriately cited in support *Wilkins* v. *Nelson,* 155 La. 807. (See *Herold* v. *Commissioner, supra.*) In the cited case, by a transfer called a "sale," all the oil and gas was "sold" to the transferee for $900 cash and one-eighth of all the oil produced and saved from the premises. The transferer brought suit to set the transfer aside on account of lesion beyond moiety under Article 1861 of the Civil Code, which applies only to sales of immovables. This the Supreme Court refused to do. Later the same contract came before the court in a suit between the same parties, *Wilkins* v. *Nelson,* 161 La. 437, and the Supreme Court said:

> At the outset, it may be well to note that the mineral contract in question was declared to be a lease in Wilkins *v.* Nelson *et al.*, 155 La. 810; 99 So. 607, the plaintiff in that case having attempted, unsuccessfully, to annul said contract for lesion, alleging that it evidenced a sale of the oil and gas beneath the surface of the land.
>
> It is clear that the contract between the parties is not a sale, but an oil and gas lease, as decided by this court, and its complexion as such cannot be changed to a perpetual option from the mere incident that the habendum clause of a sale was inserted in the contract, conveying the oil and gas, as if it were an immovable, to the "purchaser, his heirs and assigns forever."

The observation of the Circuit Court of Appeals that Smitherman by the use of the terms "sell, assign, assignor, assignee, assignment" indicated an intention to sell, is without merit.

A complete answer is to be found in the cited jurisprudence. In *Smith* v. *Sun Oil Co., supra,* the transfer was held to be a sub-lease, although called an assignment; also, in *Wilkins* v. *Nelson, supra,* the contract was determined to be a lease, although the term "sell" was used. See also *Roberson* v. *Pioneer Gas Co., supra.* Moreover, the trial court found as a fact that it was the intention of the parties to the Smitherman-Ohio contract to make a sub-lease (R. 49).

The Civil Code and an unbroken jurisprudence in Louisiana establish these propositions: That mineral contracts on a royalty basis are leases; that royalty under an oil and gas lease is rent; that the retention of an overriding or excess royalty in the transfer of an oil and gas lease characterizes that transfer as a sub-lease, because the retained royalty is rent. By the test so established, the transactions here involved are sub-leases and the observation of the Circuit Court of Appeals, unsupported by the citation of statute or decision, that the bonus received was part of the purchase price, cannot make them sales.

There is no criterion in the Revenue Act or Regulations by which the transactions in this case could be gauged as sales. By the settled law of Louisiana, they are sub-leases, and we respectfully submit that they should so be held here (*Crooks* v. *Harrelson,* 282 U. S. 55; *Poe* v. *Seaborn,* 282 U. S. 101; *United States* v. *Cambridge Loan and Building Co.,* 278 U. S. 55; *Tyler* v. *U. S.,* 281 U. S. 497).

Conclusion.

The validity of Article 215 (a) of Treasury Regulations 62, as amended by T. D. 3938, as a proper application of Section 214 (a) (10) of the Revenue Act of 1921, is clearly established by the legislative history of the Revenue laws, the successive re-enactment of which without substantial change is presumptive evidence of Congressional approval of interpretative executive regulations.

The Regulation, as amended, is a proper and reasonable application of the Revenue Act, because it is clearly within the intendment of Congress to tax true annual income. Its provisions logically apply to sublessors who receive bonuses in addition to royalties.

The transactions in this case are clearly sub-leases, and within the purview of the Revenue Act and Regulations, particularly when tested by the settled law of Louisiana. They are Louisiana contracts affecting Louisiana property and by its law they cannot be sales or assignments.

The trial court found all the facts necessary to bring petitioner under the act and regulation, and to entitle him to the relief he seeks. The partnership discovered oil by their own efforts and not as the result of purchase of proven tracts; the cost in each case was disproportionate to the fair market value at the date of discovery; the fair market value on the basic date, and the value of the royalties expected to be received, were fixed with certainty.

We, therefore, respectfully submit that the judgment of the United States District Court for the Western District of Louisiana, and of the United States Circuit Court of Appeals for the Fifth Circuit herein, should be reversed and set aside, in so far as they deny petitioner the judg-

ment he prayed for; and that this cause should be remanded to the said Circuit Court of Appeals for the Fifth Circuit, with instructions to remand it to the United States District Court for the Western District of Louisiana, with instructions to have petitioner's income tax for the years 1921 and 1922 recomputed, allowing petitioner deduction for depletion on discovery revaluation on account of the bonuses or other sums received by the partnerships of which he was a member to the extent of his distributive share therein, and entered in accordance therewith.

All of which is respectfully submitted,

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
HENRY P. DART, JR.,
HENRY P. DART,
Attorneys for E. G. Palmer,
Petitioner.

Appendix.

I.

Revenue Act of 1921, Section 214—

(a) That in computing net income there shall be allowed as deductions:

(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further,* That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

II.

Regulations 62, Article 215—

Depletion—Adjustments of accounts based on bonus or advanced royalty.—

(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the amount remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the amount remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the amount remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received to the extent that such deductions are legally allowable. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition.

III.

V-47-2981

T. D. 3938

Article 216: Depletion—Adjustments of accounts based on bonus or advanced royalty.

INCOME TAX.

Depletion—Adjustment of accounts based on bonus or advanced royalty.

Treasury Department,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 215 of Regulations 45 (1920 edition), article 215 of Regulations 62, and article 216 of Regulations 65 are hereby amended to read as follows:

Art. 216 (215). *Depletion—Adjustments of accounts based on bonus or advanced royalty*—(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

(b) Where the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in

such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If for any reason any such mineral lease shall be terminated or abandoned before the mineral which has been paid for in advance has been extracted and removed, and the lessor repossesses the leased property, the lessor shall adjust his capital accounts by restoring to the capital sum of the property the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and his income account shall be adjusted so as to include the amount so restored to capital sum as income of the year such lease is terminated or the property repossessed, and the tax thereon paid.

(d) Upon the expiration, termination, or abandonment of the lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account the excess of the depletion theretofore allowable in respect of the bonus and royalty payments over the actual depletion or loss in value sustained as a result of the operations under the lease, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

All rulings inconsistent herewith are hereby revoked.

D. H. Blair,
Commissioner of Internal Revenue.

Approved November 13, 1926.

A. W. Mellon,
Secretary of the Treasury.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 215.

E. G. PALMER, *Petitioner,*

vs.

MRS. AGNES McGRAWL BENDER, Administratrix of the Estate of Jacob O. Bender, Late Collector of Internal Revenue for the District of Louisiana, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
HENRY P. DART, JR.,
HENRY P. DART,
Attorneys for E. G. Palmer, Petitioner.

December 12, 1932.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF OF PETITIONER.

May it Please the Court:

Since the decision of this Honorable Court in Murphy Oil Company v. Burnet, No. 80, October Term, 1932 (decided December 5, 1932), squarely upholds the validity of Article 215, Regulations 62, as amended, and that regulation being equally applicable to sub-lessors, the brief filed

by respondent herein, is addressed solely to a consideration of the nature of the partnership transactions here involved. Respondent maintains they were assignments, or sales; petitioner contends that they were sub-leases.

We ask the Court to consider this short reply to respondent's brief on that question.

Respondent contends that these instruments are to be construed "according to the sense of the term used and the intention of the parties." The use of the term "to sell, assign, set over, transfer and deliver," and the employment of the habendum clause, do not suffice to characterize these transactions as sales. It is the substance of the contract which determines its nature. It is the intent of the parties as revealed in and effectuated by the entire language in the instrument, which determines its legal definition. United States v. Shea, 152 U. S. 178; Heryford v. Davis, 102 U. S. 235; Gordy v. Maestri, 170 La. 281; Burkett v. Commissioner, 31 F. (2) 667.

In Smith v. Sun Oil Co., 165 La. 907, the Supreme Court of Louisiana held the instrument there involved to be a sub-lease although it was called an assignment, and words of assignment were used in the instrument. Such is consistent with the French authorities therein cited.

In Roberson v. Pioneer Gas Co., 173 La. 313 the same court referred to its former jurisprudence, holding transfers called "assignments", to be sub-leases. In Wilkins v. Nelson, 161 La. 437, the Supreme Court considered a transfer called a "sale," wherein the grantor "sold" all the oil, gas and other minerals for $900.00 and an additional consideration of ⅛ of the oil produced and saved from the premises, with the habendum clause usual to sales, and held the contract to be one of lease.

Respondent seeks to break the force of Roberson v. Pioneer Gas Co., *supra,* by arguing that the point at issue was the effect of drilling performed by the assignee of part of a lease divisible by assignment. That assumption is not

accurate. The defendants were sued for the cancellation of a lease for non-development. The defense was that drilling by a sub-lessee of part of a lease inured to the benefit of the entire lease (Smith v. Sun Oil Co., *supra*); that the drilling had been performed by a sub-lessee, and that, therefore, the lease on the entire tract should not be cancelled. The Supreme Court recognized the rule of law as stated by defendants, but held the transaction to have been an assignment, and not a sub-lease. It was absolutely necessary for the Court to define the status of the transaction, and it discussed that question in terms which fix the transactions involved in this case as sub-leases, beyond any doubt.

Respondent says that petitioner "proceeds upon the erroneous assumption that the mere designation of payments as royalties necessarily determines their character as such" (Brief, p. 20). Petitioner has made no such assumption. At the risk of being redundant, we state our position again, in the language of Logan v. State Gravel Co., 158 La. 105, to be:

> "Our conclusion is that a mine or quarry, or land adapted to mining, or quarrying, may be leased for a certain portion of the produce of such mine or quarry, and the fact that said portion is called "royalty" instead of rent, is not of the least consequence. For "rent" (by whatever name called) is a certain profit in money, provisions, chattels or labor, issuing out of lands and tenements in retribution for the use."

The overriding or excess royalties payable to Smitherman and Baird were "certain portions of the produce" of the leased premises; that is, portions of the oil, and were clearly rents.

The assignment from Baird to the Gulf Refining Company, referred to by respondent as missing from the record, is immaterial, the contract here involved being the contract of November 16, 1921 (R. 313), which, in paragraph 6 (R. 316-317) specifies its essential terms, viz.; that

Baird should have a royalty, payable in oil, so long as oil was produced from the lease in paying quantities.

Respondent says that where a sale provides that a part of the minerals produced are to be paid to the vendor, it becomes a part of the purchase price. Cases are cited, but they are not authority for that proposition. A brief statement with respect to those cases will suffice to show why the citations are inappropriate. With the exception of Pugh v. Commissioner, 49 F. (2), 76, the cases arose in jurisdictions other than Louisiana. They are inapplicable because they involve facts different from the case at bar.

Eldredge v. United States, 31 F. (2) 924, involved the transfer of an option to lease, which became the property of and exercisable only by the transferee. The option was transferred to a third person and the lease was eventually executed by this third person and the landowner, and the transferor of the option was not a party to the lease. The subject-matter of the contract was an option, and not a lease. The citation is inappropriate.

Jefferson Gas and Coal Co. v. Commissioner, 52 F. (2) 120, held a contract requiring minimum annual payments for a term of years, totaling $310,000.00, and providing that at the end of the term a deed in fee simple was to be delivered for a consideration of $1.00, to be in all respects a sale. The Court held the contract to be a sale of the coal in place.

Jamison Coal and Coke Co. v. Commissioner, 24 B. T. A. 554, was substantially the same as Jefferson Coal and Coke Co. v. Commissioner, *supra.*

In Ruth Iron Co. v. Commissioner, 26 F. (2) 30, petitioner first leased a coal property on a royalty basis, which lease was not involved in the case, and later sold the property to the lessee for a fixed price, in cash and notes, secured by a mortgage on the property. The question before the Court was the March 1, 1913, value of the notes for income tax purposes.

In Allen v. Phillips Petroleum Co., 13 F. (2) 584, the Court said:

> "It is clear that the intention of the parties was that the consideration should consist first, of a cash payment of $71,000.00; second, of a further sum of $177,500.00 to be paid from the proceeds of oil produced on and sold from the leasehold by appellants."

There were no royalties involved, and the price was a definite sum, payable in money.

In Pugh v. Commissioner, *supra,* the taxpayer, owner of a plantation, first made an oil and gas lease, not involved in the case. He later sold one-half of his one-eighth royalty for a consideration of $50,000.00 cash and $200,000.00 payable out of the royalty so sold. The price was fixed and determined, payable in money, and a lease was not the subject-matter of the case.

In United Central Oil Corp. v. Helm, 11 F. (2) 760, the defendant agreed to pay the plaintiff for the assignment of an oil and gas lease the sum of $60,280.25, one-half cash and the balance "out of the first one-half of all the oil or gas produced and saved from said lease". The price was fixed and determined and payable in money.

The citation to Thortnon, "Law of Oil and Gas", (5th Ed.), is merely an academic discussion of the nature of royalty and rent, and has no specific application to respondent's premise.

In each case cited, where the sale of a lease or minerals was discussed, the price was payable in cash, and in a fixed amount. In none of these cases did the payment consist "in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased".

We have repeatedly challenged respondent to cite one Louisiana case wherein royalty consisting "in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased" has been held to be other than rent. To date no such case has been cited.

Respondent says, "We are not aware of any statute or of any decision in Louisiana which prohibits a sale of mineral rights with the provision that part payment of the purchase price shall be out of the yield of the property". (Br. 21)

In reply, and at the risk of repetition, we again quote from the Revised Civil Code:

> "Article 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties. It ought to consist of money, otherwise it would be an exchange."

See also Article 1764.

> "Article 2660. Exchange is a contract by which the parties to the contract give to one another, one thing for another, whatever it be, except money; for in that case it would be a sale".
>
> "Article 2671" (under Title IX, "Of Lease"): "The price should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities or even in a portion of the fruits yielded by the thing leased".

Under the plain wording of these articles, of statutory sanction, a contract, the price of which consists "in a portion of the fruits yielded by the thing" cannot be a sale or an exchange, but must be a lease.

Under these articles, a contract providing for a cash bonus, and a royalty payable in oil, cannot be a sale, because the price is not certain and does not consist in money. It cannot be an exchange, because a thing is not given for another thing, and the price consists partly in money. It is bound to be a lease, because the price, in addition to money, consists of "a portion of the fruits yielded by the thing."

These considerations have lead the Supreme Court of Louisiana to repeatedly and consistently hold such contracts to be leases. Spence v. Gravel Co., *supra;* Logan v.

State Gravel Co., *supra;* and Wilkins v. Nelson, 161 La. 437.

Respondent has referred to Article 2786 of the Revised Civil Code as recognizing that property may be sold with rent reserved. That citation is likewise inappropriate. Article 2671 of the Code, referring to the price of a lease, is found under Title IX, entitled "Of Lease". Article 2786, to which reference is made is found under Title X, entitled "Of Rents and Annuities," Chapter 1. "Of Rent of Lands," Articles 2778-2792.

Whereas, in Louisiana the grant of minerals conveys no specific thing, but only the right to extract them from the soil, in the nature of a servitude. Frost-Johnson Lumber Co. v. Sallings, 150 La. 855; Wemple v. Nabors, 154 La. 483. Such a servitude, defined in Article 647 of the Civil Code, could not be the subject of a contract of "rent of lands" as defined in articles 2779, *et seq.* of the Code, which refer to sales of land, or other immovable property in perpetuity for a perpetual charge, called rent.

Such discussion, however, is academic, because, by positive declaration of the Supreme Court, the law of lease applies to mineral contracts in Louisiana. In Spence v. Lucas, 138 La. 763, the Court said:

> "Until the Legislature shall have passed laws specially applicable to the industry of mining, which is a new one in this state, the parties engaged in those pursuits and the courts of the state will adhere to jurisprudence on the subject, and treat mineral contracts as leases."

Nearly ten years later, the Supreme Court of Louisiana, in Logan v. State Gravel Company, 158 La. 105, quoted this language from Spence v. Lucas, *supra,* and said,

> "This expression has stood upon the books for nearly 10 years, and since then the Legislature has met seven times without making any change in the law, in that respect, although the industry has greatly devel-

oped since then and many laws have been passed on the subject thereof. We conclude that the legislator is satisfied with the law of the case last cited, and hence we now reaffirm the principle therein announced. We think plaintiffs entitled to a lessor's privilege on the property sought on the leased premises".

Respondent argues that the partnerships divested themselves of their entire interest in the leases. However, considering that the grant of minerals in Louisiana does not convey any specific, corporeal thing, but only the right to extract them from the soil, in the nature of a servitude (Frost-Johnson Lumber Co. v. Sallings, *supra;* Wemple v. Nabors, *supra,* it is obvious that the partnerships to the extent of their royalty interests, payable in oil, had interests equal to those of the original lessors, whose interests remaining were royalties payable in oil.[1] See the opinion of the Trial Court. (R. 111) This Court has recognized that a sub-lessor, entitled to receive royalty, had a depletable interest in the leased property. (Lynch v. Alworth-Stephens, 267 U. S. 364)[2]

---

[1] The lease from the landowner to Smitherman reads (R. 205-206):

> "To have and to hold unto said lessee, successors and assigns, for the term and under the provisions, as follows, to wit: * * * Third, If, in the exercise of the right hereby conferred, oil or gas be found in paying quantities, then the lessee shall deliver as royalty to said Mrs. Anna Taylor, et als., free of expense, one-eighth (⅛) part of all oil saved from that produced. * * *"

The Smitherman-Ohio Oil transaction reads (R. 243):

> "To have and to hold unto the said Ohio Oil Company, its successors and assigns for and in consideration of the sum and price of Three Million Dollars Cash * * * and subject to the further obligation of the said assignee, its successors and assigns, to pay over and deliver to said assignor, the equal one-eighth (⅛) of all oil produced and saved from the above described premises as an excess royalty. * * *"

[2] Judge Bryan, the organ of the Court in the Waller, Herold and Palmer cases, said that an assignment of all the interest of the assignor, except a reserved royalty, is not an abandonment of a lease (Emerson v. Little Six Oil Co., 3 F. (2) 265); and on the strength of that decision the Montana Supreme Court held the retention of an over-riding royalty characterizes the transfer of an oil and gas lease as a sub-lease. (McNamara Realty Co. v. Sunburst Oil Co., 76 Mont. 332; 247 Pac. 166.)

Respondent says that neither Logan v. Gravel Co., *supra*, or Board of Commissioners v. Pure Oil Co., 167 La. 801, holds that the relationship of landlord and tenant existed because the royalty was rent. We shall answer him in the language of the Supreme Court of Louisiana, which in Logan v. State Gravel Co. said:

> "The sole question presented is whether the contract is one of lease; the parties having agreed as follows: 'It is understood that the matter is submitted to the Court on the question of the legal effect of the document sued on; there is no dispute as to the amount of the indebtedness claimed in the petition.' "

The determining factor which conduced to the holding in both cases that the contracts were leases, was the nature of the consideration, which, under the very plain terms of the Code was rent.

We cited articles 2711, 2712 and 2729 of the Civil Code and Louisiana Oil & Refinery Co. v. Cozart, 163 La. 90, in reply to the observation of the Circuit Court of Appeals that the failure of the Ohio Oil Company to deliver Smitherman one-eighth of the oil as an excess royalty, would not affect its rights to take the other seven-eighths. Of course we were arguing from effect to cause, even as did the Court. But whatever the nature of the contract, the Circuit Court was in error, because Article 2046 of the Civil Code provides:

> "A resolutory condition is implied in all commutative contracts, to take effect, in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution, with damages, or if the circumstance of the case permit, demand a specific performance."

The jurisprudence of Louisiana with respect to oil and gas leases, and their transfer by sub-lease, or assignment,

has resulted from a logical and consistent application of articles of the Civil Code which have remained unchanged for more than a century. The principle that the price of a sale must be a certain sum in money, while that of a lease may consist in a "certain quantity of commodities or even in a portion of the fruits yielded by the thing leased," is rigid. Irrespective of the circumstances which have presented questions in which it was involved, its application has always been logical. Mineral contracts providing for the payment of royalties (a portion of the fruits yielded by the thing leased), have always been held to be leases. The jurisprudence of the State that the retention of an over-riding royalty characterizes the transfer of an oil and gas lease as a sub-lease, is but a logical application of that principle, for a sub-lease is, in effect, a new lease, while an assignment is a sale.[3]

We respectfully submit that the transactions between Smitherman and the Ohio Oil Company, and Baird and the Gulf Refining Company, were clearly sub-leases, and that the decisions of the United States Circuit Court of Appeals for the Fifth Circuit and of the United States District Court for the Western District of Louisiana, in so far as they are prejudicial to petitioner herein, should be reversed.

All of which is respectfully submitted,

FRED R. ANGEVINE,
JOHN H. TUCKER, JR.,
HENRY P. DART, JR.,
HENRY P. DART,
Attorneys for E. G. Palmer, Petitioner.

December 12, 1932.

[3] As evidence that this is the accepted view in Louisiana, see VI Tulane Law Review No. 2, page 312. (February, 1932)

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No. 215

In the Supreme Court of the United States

OCTOBER TERM, 1932

E. G. PALMER, PETITIONER

v.

MRS. AGNES B. MCGRAWL BENDER, ADMINISTRATRIX OF THE ESTATE OF JACOB O. BENDER, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Louisiana (R. 98–116) is reported in 49 F. (2d) 316. The opinion of the Circuit Court of Appeals (R. 424–429) is reported in 57 F. (2d) 32.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1932. (R. 429.) A petition for rehearing filed April 12, 1932 (R. 430) was de-

nied April 23, 1932 (R. 435). The petition for certiorari was filed July 12, 1932. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether instruments, executed by partnerships of which petitioner was a member, effected a sale or assignment of oil and gas leases, or were merely subleases upon the basis of which the partnerships would be entitled to allowances for depletion of their respective interests.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra,* pp. 13–15.

STATEMENT

This case is one of forty-five related cases which were by stipulation consolidated for trial. (R. 355–360.) The case was tried to the court without a jury (R. 26), and was submitted upon stipulations and agreed statements of evidence (R. 92, 178, 320, 322, 324, 335).

The petitioner was a member of two partnerships known as the J. E. Smitherman Special Account and the George O. Baird Partnership. The partnership of J. E. Smitherman Special Account was formed in 1919 with the petitioner having a 15⅝ per cent proportionate interest. The partnership acquired oil and gas leases on 26,000 acres

of land in the vicinity of Haynesville, Louisiana, in the name of J. E. Smitherman in whose name all subsequent contracts were made. (R. 29–30.)

During 1919, 1920, and 1921, several wells were drilled but no oil was discovered until on March 30, 1921, a producing well was completed in a discovery area located on four of the leases. Exhibits "H" (R. 198), "I" (R. 204), "J" (R. 209), "K" (R. 213), (R. 31). On April 23, 1921, the partnership, by an instrument in writing, transferred to the Ohio Oil Company 120 acres of the 160-acre tract on which the producing well was located. The pertinent parts of the instrument were as follows (R. 31–33):

> * * * in consideration of the sum and price hereinafter set forth, he [Smitherman] has and does by these presents sell, assign, set over, transfer and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company * * * the following described property * * *:
>
> * * * * *
>
> To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigns.
>
> * * * * *
>
> To have and to hold unto the said The Ohio Oil Company, its successors and as-

> signs for and in consideration of the sum and price of three million dollars ($3,000,000.00) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of the said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000.00) out of one-half of the first oil produced and saved from the said above-described premises, and subject to the further obligation of the said assignee, its successors, and assigns, to pay over and deliver unto said assignor, his heirs, executors, and assigns, the equal one-eighth (⅛) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns with the Lessor, his heirs or assigns.

The recited consideration of $3,000,000 was paid by The Ohio Oil Company and the partnership also received the additional $1,000,000 provided for in the agreement. (R. 74.)

In 1919 the George O. Baird partnership through George O. Baird, acting for the partners, acquired a certain oil and gas lease on a then unproved area of land in Claiborne Parish, Louisiana, known as the "Langston Lease." (R. 93.) The partnership drilled a well on the property which resulted in the

discovery of oil on August 23, 1919. The Commissioner of Internal Revenue recognized their right to a discovery revaluation and found the unit value for depletion purposes to be $1.3859 per barrel. (R. 94.)

On November 16, 1921, Baird, acting for himself and the then coowners of the lease (including petitioner), made an agreement with the Gulf Refining Company of Louisiana which was embodied in a written contract. (Exhibit Y, R. 313.) The Gulf Refining Company took possession of the property under the terms of the contract, and as therein provided a deed was executed by Baird and deposited with an escrow agent agreed upon by both parties, to be delivered upon the performance by the Gulf Refining Company of the obligations recited in the contract. The deed remained in the hands of the escrow agent under the terms of the escrow agreement until 1927, when it was delivered to the Gulf Refining Company. (R. 96.)

Petitioner reported as income for 1921 his distributive share of sixty per cent of the seven-eighths of the oil received by Baird from the Gulf Refining Company under the contract with that company (Exhibit Y, R. 96, 97, 313–317), but deducted therefrom depletion based upon the discovery value previously determined by the Commissioner. Petitioner also reported as income for 1921 his distributive share of the income of the Smitherman Special Account partnership, likewise taking a deduction

for depletion based on discovery value. In 1922 petitioner similarly reported his distributive share of the income of the two partnerships and claimed corresponding deductions for depletion. These deductions were disallowed by the Commissioner of Internal Revenue. (R. 53–54, 90, 97, 153–155.)

This disallowance and certain other adjustments resulted in the determination of a deficiency in petitioner's tax of $167,209.92. (R. 195–198.) This sum and interest thereon, the aggregate being $212,937.80, was assessed against petitioner and paid by him under protest on January 4, 1927. (R. 154–155.) This suit was brought to recover that amount. One issue, not involved here, was decided in petitioner's favor and judgment was entered for him in the total amount of $16,723.78. (R. 127.)

ARGUMENT

Petitioner contends that the instruments under which the oil and gas leases in question were transferred are subleases, and therefore the partnerships respectively are entitled as sublessors to deduct depletion. Respondent submits that the Circuit Court of Appeals correctly decided that the instruments effected a sale or assignment of the oil and gas leaseholds, and accordingly the partnerships retained no interest therein which is subject to depletion.

The question presented has been passed upon previously by the Circuit Court of Appeals for the Fifth Circuit and decided adversely to petitioner's

contention, upon identical states of facts, upon petitions of other members of the Smitherman and Baird partnerships to review decisions of the Board of Tax Appeals.[1] *Waller* v. *Commissioner,* 40 F. (2d) 892, and *Herold* v. *Commissioner,* 42 F. (2d) 942. In the *Waller* case this Court denied certiorari. *Waller* v. *Burnet,* 282 U. S. 889.

Petitioner argues that the decisions of the court below are based upon the common-law distinction between sublease and assignment, while under the law of Louisiana these instruments are leases. In support of this argument, petitioner cites *Roberson* v. *Pioneer Gas Co.*, 173 La. 313, decided after the cases of *Waller* v. *Commissioner* and *Herold* v. *Commissioner, supra.* The question before the court in that case was whether a particular oil and gas lease was divisible and had been divided by assignment of a part thereof. It was held that the lease was divisible, that the assignment in question was not a sublease, and that rights which were contingent upon the drilling of a well could not be saved to the lessee by the drilling of a well by the assignee upon the leased premises assigned to him. The court there stated (p. 319):

> The distinction between an *assignment of a lease* and a *sublease* is that, in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a

[1] *L. T. Waller et al.*, 16 B. T. A. 574, and *S. L. Herold et al.*, 17 B. T. A. 933.

> sublease, the original lessee, or sublessor, retains an interest in the lease in so far as it affects the property subleased—by imposing some obligation upon the sublessee in favor of the sublessor, such as an obligation to pay additional rent to the sublessor. * * *

There are general statements in the opinion of the court that payment of royalty is payment of rent under the settled law of Louisiana, and that the reservation of an overriding royalty by a lessee in transfering his interest to another characterizes the transaction as a sublease. From these statements petitioner argues that since part of the payments under the instruments in suit are designated royalties, it follows that under the law of Louisiana they are subleases and not assignments. But the statements relied upon were thrown out arguendo and were not necessary to the decision, which was that the transaction under consideration was an assignment and not a sublease. Furthermore the designation of payments as royalties does not necessarily determine their character as such.[2] To call a part of the purchase price of a property right rent would not make it rent or change the position of a vendee to that of tenant. In referring to an obligation to pay royalty or rent as determining the character of an instrument as a sublease, the court undoubtedly meant royalty or rent paid for the use of the property and not a payment which is

[2] See *Murray* v. *Barnhart*, 117 La. 1023; *State ex rel. Bulkley* v. *Whited & Wheless, Ltd.*, 104 La. 125. Cf. *Rives* v. *Gulf Refining Co.*, 133 La. 178.

in fact purchase money fortuitously designated rent or royalty. That this was the meaning of the court seems clear since the basic test laid down by the court was whether the original lessee retains an interest in the leasehold.

This view of the court's language is sustained by what the same court said in *Smith* v. *Sun Oil Co.*, 165 La. 907, upon which the court relied in *Roberson* v. *Pioneer Gas Co., supra.* In *Smith* v. *Sun Oil Co., supra,* numerous writers, on both the common law and the civil law, are quoted. From these authorities it is apparent that the distinction between a sublease and an assignment of a lease under the civil law is not substantially different from the common law. In each case it depends upon the essential character of the grant.

Under the common law, if a lessee grants an interest less than his own, it is a sublease; if he parts with the whole of his interest, it is an assignment. See *Craig* v. *Summers,* 47 Minn. 189; *Stewart* v. *Long Island R. R. Co.,* 102 N. Y. 601; *In re Bayley,* 177 Fed. 522 (W. D. Pa.). In *Smith* v. *Sun Oil Co., supra,* the contract involved was held to be a sublease (p. 912) because the grantor did not dispose of all its rights and obligations under the original lease but granted an interest less than its own and imposed an obligation upon the grantee under penalty of reversion to the grantor (original lessee) in addition to the obligations assumed in favor of the original lessor. When subjected to these tests,

we believe the transactions in question undoubtedly were assignments under either the civil or common law systems.

Petitioner further argues (Br. 44–45) that the decision of the court below conflicts with Articles 2439, 2464, and 2671 of the Revised Civil Code of Louisiana. These articles provide that the price of a sale must be certain and consist of a sum of money. But Article 2464 further provides that "otherwise it would be considered as an exchange." It seems entirely immaterial to the present question whether the transactions be considered sales or exchanges. Since the only question presented here is whether petitioner parted with all of his interest in the depletable property, whether this occurred through means of an exchange or a sale is beside the point. For the purpose of computing taxable gain or deductible loss the same rule applies to exchanges and sales. (Section 202 of the Revenue Act of 1921.)

There seems to be no doubt that under the laws of Louisiana there may be a sale of mineral rights providing for part payment of the purchase price out of the yield of the property. In *Dorcheat Gravel Co.* v. *Herold,* 173 La. 640, the Supreme Court of Louisiana recognized the validity of a sale of sand and gravel, and a plant, for a present sum of money and a further consideration of a royalty to be paid by the vendee of $0.05 per cubic yard for all sand or gravel sold or shipped. Cf. *Wilkins* v. *Nelson,* 155 La. 807, 161 La. 437.

It is submitted that the petitioner and his associates parted with their entire interest in the premises under the respective leases, and that they had no depletable property remaining after the transfer. We believe the decision is correct on this ground, and in this view of the case the other arguments advanced by petitioner are inapplicable.

Those arguments are that the decision of the court below has the effect of holding invalid Article 215 (a) of Treasury Regulations 62, as amended (*infra*, p. 15) and that it is in conflict with *Murphy Oil Co.* v. *Burnet*, 55 F. (2d) 17 (C. C. A. 9th), now pending in this Court on certiorari, No. 80, October Term, 1932.

But Article 215 (as amended) relates only to the allowances and adjustments to be made in the case of a lessor; it makes no provision for a sublessor, who is a lessee with relation to the owner and a lessor with relation to the subtenant. The statute merely provides that the deductions allowed by it shall be "equitably apportioned between the lessor and lessee." Section 214 (a) (10) of the Revenue Act of 1921 (*infra*, pp. 13–14). The Circuit Court of Appeals held that the grantees of the partnerships, who were the operators of the property, are to be considered as lessees and beneficiaries within the meaning of the section providing for equitable apportionment of the allowance between lessor and lessee, and that it would be inequitable to allow depletion on the lump sum payments made to the

partnership or on seven-eighths of the oil produced. The regulation does not cover petitioner's case.

In *Murphy Oil Co.* v. *Burnet, supra,* the question is whether a depletion allowance to a lessor should be deducted from a bonus paid upon the execution of an oil lease or whether it should await the actual extraction. The taxpayer was a lessor, and there was not a third claimant to a depletion allowance. The right to a deduction was not disputed in that case, the controversy being over the time when it might be taken. That question is not in the present case. That case is also distinguishable in that there was no question of equitable apportionment of the depletion allowance.

CONCLUSION

The case was correctly decided below, and there is no conflict with any decision of a circuit court of appeals nor with the applicable local law. The question presented turns on the construction of two particular instruments under local law, and no principle of general application is involved. The petition should be denied.

Respectfully submitted.

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Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

SEWALL KEY,
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Special Assistants to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

AUGUST, 1932.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 239:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but * * *

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to

March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further,* That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Treasury Regulations 62:

ART. 215. *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the amount remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the amount remaining to be recovered, the excess and all

the royalties thereafter received will be income and not depletable. If the bonus is less than the amount remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received to the extent that such deductions are legally allowable. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition.

ART. 215. [As amended by T. D. 3938 (1926), C. B. V–2, p. 117.] *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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for rehearing filed April 12, 1932 (R. 430), was denied April 23, 1932 (R. 430). The petition for certiorari was filed July 12, 1932, and was granted October 17, 1932. (R. 430.) Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether two certain instruments, each executed by a partnership of which petitioner was a member, effected a sale or assignment of oil and gas leases or were merely subleases upon the basis of which the partnerships would be entitled to allowances for depletion of their respective interests.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra,* pp. 28–35.

STATEMENT

This case is one of forty-five related cases which were by stipulation consolidated for trial. (R. 355–360.) The case was tried to the court without a jury (R. 26) and was submitted upon stipulations and agreed statements of evidence. (R. 92, 178, 320, 322, 324, 335.) The District Court made certain findings of fact (R. 28–55, 59–90), which may be summarized as follows:

The petitioner was a member of two partnerships known as the J. E. Smitherman, Special Account, and the George O. Baird Partnership.

J. E. Smitherman, special account

Early in 1919, J. E. Smitherman and a group of associates, including petitioner, entered into a contract with certain citizens of Haynesville, Louisiana, wherein it was agreed that if the latter would lease to Smitherman and his associates 15,000 acres of designated land in the vicinity, Smitherman and his associates would pay a bonus of 50 cents per acre for such leases and would drill a test well on the property within eight months. A partnership was thereupon formed composed of Smitherman and associates, known as "J. E. Smitherman, Special Account," in which petitioner had a 15 5/6 per cent interest. The partnership obtained leases on about 26,000 acres of land in the vicinity of Haynesville in the name of Smitherman, in whose name all subsequent contracts were made. (R. 29–30.)

During 1919, 1920, and 1921 several wells were drilled, but no oil was discovered until March 30, 1921, when a producing well was completed in a discovery area located on land covered by four of the leases. Exhibits H (R. 198), I (R. 204), J (R. 209), and K (R. 213). (R. 31.)[1] This well

[1] These leases provide that they are for the purpose of exploiting the land and producing minerals therefrom. Each lease granted the exclusive right of "drilling and operating thereon for oil or gas and other minerals." The lessee is given the right to begin drilling within one year, with the right to a limited number of extensions of time for six-month periods upon the payment of 50 cents per acre on or

had an estimated daily production of 7,500 barrels and cost approximately $25,000 to complete. (R. 51.)

On April 23, 1921, the partnership by an instrument in writing transferred to the Ohio Oil Company their interest in 120 acres of the 160-acre tract on which the producing well was located.[2] The

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before the commencement of each six-month period. Upon the discovery of oil or gas the lessor is to receive one-eighth of the oil and $300 per year for each gas well.

[2] This instrument covers three forties (120 acres) of a quarter-section (NW.¼, Sec. 14, Township 23 North, Range 8 West, Claiborne Parish, La.), embraced in the lease from Anna Taylor et al., to Smitherman. (Exhibit H. R. 198, 199.) The partnership by an instrument executed April 21, 1921, transferred a one-half interest in the other forty acres of the above quarter-section to the Gilliland Oil Company for a cash payment of $600,000. (R. 39–41.) That instrument was executed pursuant to an agreement or contract of sale dated April 18, 1921, providing for the sale and assignment of a one-half interest in the leases for said forty acres, and also of a one-half interest in a number of other leases in consideration of $150,000 and a half interest in certain property owned by the grantee. (Exhibit M, R. 221–227.) The instrument transferring the one-half interest in the other leases was executed April 21, 1919. (Exhibit R, R. 228–238.) When the present suit was brought in the United States District Court petitioner claimed that the instrument transferring the one-half interest in the forty acres referred to above was a sublease and that he was entitled to deduct depletion from the $600,000 received thereunder. This claim was abandoned at the trial, petitioner conceding that the instrument was clearly an assignment. (The fact of the abandonment of this issue does not appear in the printed record, but is set out in petitioner's brief in the Circuit Court of Appeals, pp. 17–18.)

pertinent parts of the instrument are as follows (Exhibit N, R. 31–33):

> * * * in consideration of the sum and price hereinafter set forth, he [Smitherman] has and does by these presents sell, assign, set over, transfer, and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty, unto The Ohio Oil Company * * * the following-described property * * *:
>
> * * * * *
>
> To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants in said mineral lease, and payment of rentals and royalties as stipulated in said mineral lease, in so far as same covers and effects that portion herein assigned.
>
> To have and to hold unto the said The Ohio Oil Company, its successors, and assigns for and in consideration of the sum and price of three million dollars ($3,000,000) cash in hand paid, the receipt of which is hereby acknowledged, and full discharge and acquittance granted therefor, and the obligation of the said The Ohio Oil Company, to pay over and deliver unto the Assignor, his successors and assigns, the sum of One Million Dollars ($1,000,000) out of one-half of the first oil produced and saved from said above-described premises, and subject to the further obligation of the said assignee, its successors and assigns, to pay

over and deliver unto said assignor, his heirs, executors, and assigns, the equal one-eighth (⅛) of all oil produced and saved from the above described premises as an excess royalty, whether produced under the present lease contract or under any extension, renewal, or other contractual obligations entered into by and between the said Assignee, its successors or assigns, with the Lessor, his heirs or assigns.

It is agreed and understood that if the said The Ohio Oil Company, its successors or assigns, should elect to manufacture casing head gasoline from the premises herein assigned, that the said Smitherman, his heirs and assigns, shall share in the profits derived from the one-eighth (⅛) thereof, provided he contributes a like proportion of the costs and expenses of building the plants and equipping same for the purpose of manufacturing said casing head gasoline, and a like proportion of the expenses of manufacturing same.

The recited consideration of $3,000,000 was paid by The Ohio Oil Company, and the partnership also received the additional $1,000,000 provided for in the agreement. (R. 74.)

On the same date, by another instrument the partnership transferred to The Ohio Oil Company, one hundred and twenty-eight leases, including specifically parts of the land leased by Exhibits "H" and "J," *supra* (R. 275, item 92; R. 272, item 82; R. 285, item 125), and also covering by a general

provision all leases other than those listed owned by the partnership in the townships and ranges named, except that portion of the area covered by the lease from Anna Taylor et al., as to which previous assignments had been made to The Ohio Oil Company and the Gilliland Oil Company. (R. 286.) The consideration for this transfer was a present cash payment of $370,000 and an obligation to pay to the assignor one-eighth of the oil produced and saved, "whether under the present lease contracts herein assigned, or under any extensions, renewals, or other contractual obligations or covenants entered into by" The Ohio Oil Company, its successors or assigns, with the present lessors, their heirs, and assigns. (R. 287.) (Exhibit "Q," R. 249–288.) No claim for a depletion allowance has been made by petitioner with respect to payments received under this instrument.

Also, on April 23, 1921, the Ohio Oil Company addressed to Smitherman a letter reading as follows (R. 38–39, 75, 248–249):

THE OHIO OIL COMPANY,
Shreveport, La., April 23, 1921.

Mr. J. E. SMITHERMAN,
Shreveport, Louisiana.

DEAR SIR: With reference to the act of assignment executed this day by you unto The Ohio Oil Company transferring and conveying unto said company one hundred twenty-eight oil, gas, and mineral leases covering and affecting lands situated in Claiborne Parish, Louisiana, in Twp. 22

North, Ranges 7 and 8 West, and in Twp. 23 North, Ranges 6, 7, and 8 West, this writing is addressed to you for the purpose of expressing the agreement of this company that if at any time hereafter we shall elect to release, surrender, or cancel all or any part of any one or all of said leases, then before effecting such release or cancellation such lease or leases or part or parts thereof will be first offered to you, and if you shall request it, same will be reassigned or reconveyed to you by this company instead of being released or surrendered direct to the lessors.

Yours very truly,

THE OHIO OIL COMPANY,

By J. K. KERR, *Vice President.*

JKK: C.

On July 12, 1921, Smitherman and the Ohio Oil Company entered into what they termed a working agreement, under which the Ohio Oil Company was to gather, store, and dispose of the one-eighth of the oil produced and saved, which was to be paid to Smitherman under the instrument of April 23, 1921, transferring the lease covering the 120-acre area. (R. 75–78; Exhibit "O," R. 245–247.)

George O. Baird partnership

In 1919, Baird, acting for the partnership, acquired an oil and gas lease of a certain area of land, then unproved, in Claiborne Parish, Louisiana, known as the "Langston Lease." (R. 52, 93.) The partnership drilled a well on the property which

resulted in the discovery of oil on August 23, 1919. The Commissioner of Internal Revenue recognized their right to a discovery revaluation and found the unit value for depletion purposes to be $1.3859 per barrel. (R. 94.)

On November 16, 1921, Baird, acting for the partnership, entered into a written contract with the Gulf Refining Company of Louisiana with respect to the lease. (R. 96.) Under this contract the Gulf Refining Company obligated itself to take possession of the "lease," to equip and operate the wells for the production of oil, at its entire expense, and to pay all taxes. Of the oil produced, it was to retain forty per cent, out of which it was to pay the royalty of one-eighth (⅛) of all oil produced to the lessor, and to pay one-twenty-fourth (1/24) to Baird for a term of three years, after which the payment to Baird was to be one-thirty-second (1/32nd) of all oil produced. The agreement recited that the Gulf Refining Company had loaned to Baird $350,000, on the security of the lease, without any personal liability and without interest. Sixty per cent of the oil produced was to be delivered to Baird (free from any claim on account of the loan of $350,000) until he had received $325,000 therefrom, or until a period of thirty months elapsed; after which the Gulf Refining Company might reimburse itself from the sixty per cent of the oil for the loan of $350,000. Baird agreed that after the sixty per cent of the oil had produced said two sums aggregating $675,000, he

would sell, assign, and convey to the Gulf Refining Company the lease in its entirety; and as security for the performance of this agreement Baird contemporaneously executed an assignment of the entire interest in the lease which was to be placed in escrow and delivered to the Gulf Refining Company when it should have performed the obligations set out and made a consideration for the assignment. (Exhibit "Y", R. 313–318.)

As provided in the contract, the Gulf Refining Company took possession of the property, and a deed was executed by Baird and deposited with an escrow agent agreed upon by both parties, to be delivered under the conditions named in the contract. The deed was delivered by the escrow agent to the Gulf Refining Company some time in 1927. (R. 89, 96.)

The $350,000, referred to in the contract as a loan, was not paid to the partnership, but was at the direction of Baird paid by the Gulf Refining Company to one Munhall, in compliance with the terms of a judgment of a district court of Louisiana resolving or rescinding a prior contract to sell the Langston Lease to one Flannery, Munhall's assignor. Flannery had paid to the partnership in 1919 a net sum of $350,000 on account of the purchase price, but failed to pay the balance. Baird brought an action in the State court to set aside the contract, and obtained a judgment setting aside the contract as of its date and freeing the property of any claim or interest of Flannery or his as-

signs—the judgment to become operative upon the payment to Munhall of said sum of $350,000. (R. 96, 290, 309–311.)

The total remaining unreturned costs of the Langston Lease to the partnership at the date of the transfer to the Gulf Refining Company on November 16, 1921, for both depletable and depreciable property, was $96,114.90. (R. 320.)

Petitioner reported as income for 1921 his distributive share of sixty per cent of the oil received by the George O. Baird partnership from the Gulf Refining Company under the contract, but he made a deduction for depletion based upon the discovery value previously determined by the Commissioner of Internal Revenue. Petitioner also reported as income for 1921 his distributive share of the income of the partnership, J. W. Smitherman, Special Account, received under the contracts with the Ohio Oil Company and the Gilliland Oil Company transferring leases or interest in leases in the discovery area (Exhibit N, R. 242–244; Exhibit L, R. 217–221), and deducted depletion on a claimed discovery value. For 1922 petitioner similarly reported his distributive share of the income of the two partnerships and claimed corresponding deductions for depletion. These deductions were disallowed by the Commissioner.[3] (R. 51–53, 90, 97, 152–155.)

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[3] Petitioner has since conceded that he is not entitled to depletion on the sums received under the contract with the Gilliland Oil Company. (See note 2, *supra*, p. 4.)

This disallowance and certain other adjustments resulted in the determination of deficiencies in petitioner's income tax for 1921 of $129,138.75, and for 1922 of $38,071.17, a total of $167,209.92. (R. 53.) This sum and interest thereon, amounting to $212,937.80, was assessed against petitioner and paid by him under protest on January 4, 1927. (R. 53–54.) After rejection of claims for refund, the present suit was brought to recover the amount paid. One issue, not involved here, was decided in petitioner's favor and judgment was entered for him in the amount of $16,723.78.[4] (R. 127.) The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 429.)

SUMMARY OF ARGUMENT

In Louisiana, as in other states, a lessee may assign his rights under a mineral lease.

In Louisiana, as elsewhere, instruments are construed according to the sense of the terms used and the intention of the parties. These instruments clearly express an intention to convey to the transferees all the rights of the transferor under the lease; nothing in either instrument discloses an intention to create the relation of landlord and tenant.

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[4] The Commissioner had determined that the $350,000 paid by the Gulf Refining Company to Munhall in 1921, on behalf of the Baird partnership, was income to the latter, but the court below held to the contrary (R. 429) and judgment was entered in petitioner's favor on this issue.

The distinction between an assignment and a sublease in Louisiana is not substantially different from such distinction under the common law. Under either system, if the lessee transfers all of his rights and obligations under the lease without a right of reversion, the transfer is an assignment. The fact that a lessee's interest under a lease in Louisiana is of a different quality does not affect this question. Further, the fact that the purchase price is to be paid partly in oil extracted from the premises is not controlling. If the instrument effects a sale of the property right, the minerals paid thereunder are not rent or royalty, but purchase money.

In the instant case, the transfers, whether judged by the civil law of Louisiana or the common-law standards more generally applicable, effected assignments and not subleases. Hence, petitioner had disposed of all his depletable interest in the property against which an allowance is now sought.

ARGUMENT

The court below decided that under the law of Louisiana each of the instruments involved, the one executed by Smitherman and the other by Baird, effected a complete assignment of the property of the partnership in the lease assigned, and thus amounted to a sale of the assignor's interest. In so holding, it followed its earlier decisions concerning the construction of the same instruments.

Waller v. *Commissioner,* 40 F. (2d) 892, certiorari denied, 282 U. S. 889 (Smitherman instrument); *Herold* v. *Commissioner,* 42 F. (2d) 942 (Baird instrument).

Petitioner contends that each of the instruments is a sublease, and accordingly claims the right to deduct an allowance for depletion against his share of the two payments received by the Smitherman partnership from the Ohio Oil Company aggregating $4,000,000, and also against his share of the amount received by the Baird partnership from the Gulf Refining Company on account of the $325,000 to be paid out of sixty per cent of the oil produced. Revenue Act of 1921, Sec. 214 (a) (1), *infra,* p. 28.

Petitioner relies on *Murphy Oil Co.* v. *Burnet,* decided by this Court December 5, 1932 (No. 80, October Term, 1932), but that case can have no present application for it dealt with the right of a lessor to deduct depletion from a bonus paid upon the execution of an oil lease. The partnership of which petitioner was a member were neither lessors nor sublessors of oil properties. Upon execution of the instruments by Smitherman and Baird, petitioner and his associates parted with their entire interest in the premises and thereafter retained no depletable property against which an allowance could be made.[5] The petitioner apparently recog-

[5] The Revenue Act of 1921, Sec. 213 (a), c. 136, 42 Stat. 227, 237–238, provides that the gain, profits, or income from the sale of property is gross income. The basis for ascer-

nizes that if this was the case there is no basis for a depletion allowance to him and the question therefore is, Whether such instruments constituted assignments effecting a sale, or subleases.

I

UNDER THE LAW OF LOUISIANA, AS UNDER THE COMMON LAW, EACH OF THE INSTRUMENTS INVOLVED WAS AN ASSIGNMENT AND EFFECTED A SALE OF THE RIGHTS OF THE PARTNERSHIPS IN THE LEASES ASSIGNED. HENCE, PETITIONER RETAINED NO INTEREST IN THE PROPERTY AGAINST WHICH DEPLETION COULD BE ALLOWED

It is apparently undisputed that under the common law the instruments here in question would be construed as complete assignments of the leasehold rights. Petitioner insists that they would not be so construed under the law of Louisiana. We contend, however, that these instruments, under the civil as well as the common law, must be regarded as assignments.

In Louisiana, as in other jurisdictions, instruments are construed according to the sense of the terms used and the intention of the parties. See *Cooke* v. *Gulf Refining Co.*, 127 La. 592; *Bender* v. *Chew*, 129 La. 849. In the present case the language of the instruments themselves clearly shows

taining the gain derived from the sale of property acquired after February 28, 1913, is the cost. Revenue Act of 1921, Sec. 202 (a), 42 Stat. 227, 229. There is no provision which allows a deduction for depletion from the amount received upon a sale of property in mineral deposits, or for exhaustion in case of the sale of an incorporeal right.

an intention to transfer the entire property of the grantors in the leases. There is nothing in either instrument to indicate that the parties intended to create the relation of landlord and tenant.[6]

In the instrument executed by Smitherman, it is provided that, in consideration of the named sum and price, Smitherman "has and does by these presents sell, assign, set over, transfer, and deliver, without warranty or recourse, but with full subrogation of all rights and actions of warranty" the lease, in so far as it affects the area described; "To have and to hold unto The Ohio Oil Company, its successors and assigns forever, subject to the performance of the terms and covenants[7] * * *." (R. 31–32.)

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[6] Petitioner's twelfth requested finding of fact in the trial court was as follows: "12. That it was the intention of the partnership and of the Ohio Oil Company by said transfers to sublease the acreage covered." This request was granted by the District Court (R. 49), which refused, however, to conclude as a matter of law that the transfer from Smitherman to the Ohio Oil Company was a sublease (R. 55). The trial court's finding of fact was assigned as error by respondent on cross-appeal to the court below. (Br. 22.) The Circuit Court of Appeals apparently refused to accept the finding of the District Court, saying (R. 427): "There is nothing in either instrument to indicate that it was the intention of the parties to it to create the relationship of landlord and tenant." In any event, the finding is immaterial, since the parties unquestionably intended to make the particular instruments before the court, and the only issue presented for decision was the construction of the contracts, which presents a question of law and not a fact.

[7] This instrument covered only 120 acres. By the other instrument executed on the same day Smitherman trans-

In the instrument executed by Baird, the Gulf Refining Company was obligated to take possession of the property, equip and operate it at its own expense, and to make certain payments to Baird out of the oil produced. Baird agreed that upon the making of the payments specified he would "sell, assign, convey, and deliver" to the Gulf Refining Company the "entirety of the said mineral lease." (R. 316.) The instrument recited that upon that day Baird executed an assignment [8] to the company of "his entire interest in the said lease," to be deposited in escrow and to be delivered to the company when the obligation of the latter had been fulfilled. (R. 317.) It was further stated that the company loaned Baird $350,000 on the sole security of the lease, but without any personal liability of Baird, and without interest; the company, it was provided, was to reimburse itself out of sixty per cent of the oil produced, after the payment therefrom of $325,000 to Baird.

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ferred to the Ohio Oil Co. in substantially the same terms leases covering 17,000 acres. (R. 78, Exhibits Q and R, R. 249–288.) No claim has been made by petitioner for a depletion allowance with respect to those leases, although this assignment provides for a payment to the assignor of one-eighth of the oil produced in addition to a cash "price" of $370,000. (R. 287.)

[8] The assignment, although it was admittedly delivered, was not produced either in the present case or in *Herold* v. *Commissioner*, 42 F. (2d) 942 (C. C. A. 5th). The court below assumed that in form it really was an assignment. (R. 427.) There is no claim here that the contract was a mortgage or pledge, as was suggested by one of the other partners in the *Herold case*.

It is settled that in construing a contract the intention of the parties, as disclosed by the language they have used, is controlling. See *Heryford* v. *Davis,* 102 U. S. 235, 243–244, 245. The same rule is applied in construing oil and gas leases, both in the Federal courts, *Burkett* v. *Commissioner,* 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565, and in Louisiana, *Rives* v. *Gulf Refining Co.,* 133 La. 178, 182. See also *Murray* v. *Barnhart,* 117 La. 1023; and see *Bulkley* v. *Whited & Wheless, Ltd.*, 104 La., 125.

There is no doubt of the power of Smitherman and Baird to assign their rights under the mining leases. Revised Civil Code of Louisiana, Articles 2449, 2725, *infra,* pp. 33, 35; *Robertson* v. *Pioneer Gas Co.,* 173 La. 313; *Anse La Butte Oil & Mineral Co.* v. *Babb,* 122 La. 415; *Weatherly* v. *Baker,* 25 La. Ann. 229. Nor is it suggested that in the case of the instrument executed by Baird, the futurity of the transfer would prevent the agreement from constituting an assignment. A promise to sell has been held to amount to a sale, and either party has the right to specific performance. Revised Civil Code, Article 2462, *infra,* p. 33; *Girault* v. *Feucht,* 117 La. 276; *Kinberger* v. *Drouet,* 149 La. 986.

It is clear that Smitherman and Baird used terms expressive of an intent to convey to the transferees all the rights held by them under the leases. To overcome the plain effect of the words and the apparent purpose with which they were used, peti-

tioner argues that the law of Louisiana requires instruments like the present to be regarded as leases. He relies mainly upon *Roberson* v. *Pioneer Gas Co., supra,* which was decided after *Waller* v. *Commissioner, supra,* and *Herold* v. *Commissioner, supra,* but before the decision of the instant case.

In the *Roberson case* the question was whether a particular oil and gas lease was divisible and had been divided by an assignment of the lease affecting a specified part of the leased area. The court held that the lease was divisible, that part of it had been assigned, and that the drilling of a well upon the portion of the leasehold which was assigned could not save the lessee's rights with respect to the balance of the leasehold. In the course of the opinion the court stated that an assignment of a lease might be distinguished from a sublease in that in the former the assignor disposes of his entire interest in the lease, whereas in a sublease the sublessor retains some interest in the property "by imposing some obligation upon the sublessee in favor of the sublessor, such as an obligation to pay additional rent to the sublessor * * *" (p. 319). The court further remarked by way of general argument that payment of royalty is a payment of rent under the settled law of Louisiana, and hence that the reservation of an overriding royalty by a lessee in transferring his interest to another characterized the transaction as a sublease. Upon the basis of these statements peti-

tioner argues that since part of the payments under the instruments in suit are designated royalties, it follows that under the law of Louisiana the transactions now involved are subleases and not assignments.

The argument advanced by petitioner proceeds upon the erroneous assumption that the mere designation of payments as royalties necessarily determines their character as such. Cf. *Murray* v. *Barnhart, supra,* p. 1033. To call a part of the purchase price of a property right "rent" would not make it rent or change the position of a vendee to that of a tenant. "Royalties" paid under a lease may be regarded as rent, but there is a clear distinction between such payments made by a tenant to his landlord and payments made by the purchaser of land or of an interest in land out of minerals to be removed from the land under an instrument of sale or assignment. When there is a sale of the land or an assignment of a leasehold and it is provided that a part of the minerals, when extracted, are to be paid to the vendor, the minerals paid over under the agreement of sale must be regarded not as rent or royalty, but as purchase money. See 2 Thornton, Law of Oil and Gas (5th Ed.) Sections 363, 364. See also *Eldredge* v. *United States,* 31 F. (2d) 924, 926 (C. C. A. 6th); cf. *Jefferson Gas Coal Co.* v. *Commissioner,* 52 F. (2d) 120 (C. C. A. 3d); *Jamison Coal & Coke Co.* v. *Commissioner,* 24 B. T. A. 554, 570. The sales of oil and gas leases with provisions for part payment out of the proceeds

of the oil property is a familiar method of transferring such properties. See *Pugh* v. *Commissioner*, 49 F. (2d) 76 (C. C. A. 5th), certiorari denied, 284 U. S. 642; *Eldredge* v. *United States, supra; Ruth Iron Co.* v. *Commissioner*, 26 F. (2d) 30 (C. C. A. 8th); *Allen* v. *Phillips Petroleum Co.*, 13 F. (2d) 584 (C. C. A. 8th); *United Central Oil Corp.* v. *Helm*, 11 F. (2d) 760 (C. C. A. 5th), certiorari denied, 271 U. S. 686. In such cases payments measured by the yield of the oil properties should be regarded as installments of purchase price and not as royalties.[9]

We are not aware of any statute or of any decision in Louisiana which prohibits a sale of mineral rights with the provision that part payment of the purchase price shall be out of the yield of the property. On the contrary, the Revised Civil Code of Louisiana, Article 2786, *infra*, specifically recognizes that property may be sold with the rent reserved. Under these circumstances, we submit, the reference in *Roberson* v. *Pioneer Gas Co., supra*, to an obligation to pay royalty as determining the character of an instrument as a sublease must have meant royalty paid for the use of the property

[9] Petitioner states on page 23 of his brief that the Commissioner has allowed depletion with respect to the royalties received by the Smitherman and Baird partnerships. The circumstances under which such an allowance may have been made are not in the record, but if made, it was made erroneously and can not affect the decision of the issue presented here. With reference to subsequent years, the Commissioner has recognized his error and has now refused to make this allowance.

and not for its transfer. To interpret it as meaning that there can be no sale where the purchase price is stipulated to be paid in part out of the issues of the property would be to disregard the Civil Code (Article 2786, *supra*) and other decisions of the Louisiana Supreme Court upon which it relied in deciding the *Roberson case*.

In *Smith* v. *Sun Oil Co.*, 165 La. 907, the question was whether an instrument affecting a part of a leased area was an assignment, and hence operated to divide the lease, or was a sublease, so that production of oil thereunder prevented forfeiture as to the nonproducing balance of the leased area. The instrument was held to be a sublease. The court decided that the conditions of the contract which made it a sublease were that the lessee did *not dispose of all of its rights and obligations under the original lease on the 20 acres,* but granted to the sublessee an interest less than its own, and imposed upon him obligations under penalty of reversion to the sublessor (lessee), in addition to the obligations assumed in favor of the original lessor. The purpose of the sublease was to obtain immediate development and production on the leased premises in order to prevent a forfeiture of the original lease, and it was stipulated that the sublessee should commence drilling within thirty days, and drill and complete all wells necessary to protect the lines. For any failure in this respect the sublessee would forfeit all of his rights and they would revert and revest in the sublessor. The sublessee

was to pay a royalty to the sublessor, in addition to the royalty payable to the original lessor; and it was stipulated that whenever the sublessee should cease operations, all of his rights should revert to and revest in the sublessor. The court cites and quotes from numerous writers, on both the civil and the common law, who point out the distinction between an assignment and a sublease. From these authorities it is apparent that such distinction is not materially different under the two systems. Under each system, if the lessee grants his entire interest under the lease with respect to the part covered by the grant and without any reversion to lessee, it is an assignment; if the lessee grants an interest less than his own, it is a lease.[10]

Smith v. *Sun Oil Co., supra,* was cited with approval in *Johnson* v. *Moody,* 168 La. 799, although the latter case was decided upon another point.

The *Smith* and *Johnson cases* were relied upon by the court in the *Roberson case.* We submit that they support the conclusion that the present instruments created assignments and not subleases. It is true that in the *Roberson case* the Louisiana court, discussing the *Smith* and *Johnson cases,* stated that the reference to penalty of reversion in the latter was not intended in the technical sense

[10] Under the common law see *Craig* v. *Summers,* 47 Minn. 189; *Davidson* v. *Minnesota Loan & Trust Co.,* 158 Minn. 411; *Stewart* v. *Long Island R. R. Co.,* 102 N. Y. 601; *Gillette Bros., Inc.* v. *Aristocrat Restaurant, Inc.,* 239 N. Y. 87, 90; *In re Bayley,* 177 Fed. 522 (W. D. Pa.); 1. Tiffany, Landlord and Tenant, pp. 907–909, 917.

of the common law, but that it contemplated the reversion of the rights of occupancy or use of the property. This distinction is based upon the difference between the common law and the civil law with reference to the nature of a lessee's interest; in the former a lessee has an estate in the leased property, whereas under the civil law the lease grants only the right to the use or enjoyment of the property. See *Viterbo* v. *Friedlander,* 120 U. S. 707; Revised Civil Code of Louisiana, Articles 2669, 2674; *Wemple* v. *Nabors Oil & Gas Co.,* 154 La. 483. But in applying the rule laid down by the court the quality of the right of the lessee is not important. The question is whether he has by his grant divested himself of his leasehold interest in its entirety. If he has, the grant would be an assignment under either system.

Petitioner cites *Logan* v. *State Gravel Co.,* 158 La. 105, and *Commissioners* v. *Pure Oil Co.,* 167 La. 801, as holding that royalty under oil and gas leases is always rent. We submit that those decisions are not applicable here, as the issue in the instant case is whether or not there was a *sale* of the lessee's property rights. If the instruments executed by Smitherman and Baird effected sales, there is no necessity of noting what would be the character of the royalty payments if the instruments had effected leases. Neither of the above cases holds that the relationship of landlord and tenant existed *because* the royalty was rent. The distinction made by the court in *Logan* v. *State*

Gravel Co. was that in a "sale," ownership of the thing sold passes out of the vendor forever, while in the case of a lease the ownership of the thing leased remains in the lessor (landlord) and the tenant acquires only the use or enjoyment of the thing leased and must return it at the end of the term. The instrument there in question conformed with the latter conditions and was held to be a lease for that reason. The basic holding of the two cases last cited is that the terms of the contracts created the relation of landlord and tenant, with the necessary concomitant that payments made by tenant to landlord were rent, whatever term may have been used to describe them. In the present case, however, the fundamental condition—that is, the relation of landlord and tenant—is absent, and the payment *a fortiori* can not be rent.

It is further suggested that because the instruments in question provided for payment to the respective grantors of part of the oil produced they could not be sales under Articles 2439, 2464, and 2671, of the Revised Civil Code of Louisiana, *infra,* pp. 33, 34, 35, which require, among other things, that the consideration for a sale must be certain. The same elements are required in a contract of lease as are required by Article 2439 in the case of a sale, to wit, the thing, the price, and the consent. (Article 2670, *infra,* p. 34.) Likewise, in the case of a lease there must be a fixed price. (Article 2671, *infra,* p. 35.) It would seem plain that these statutes provide merely that the measure

of the consideration must be agreed upon and not left to future bargaining—not that it must be capable of exact mathematical computation at the time of entering into the contract.[11]

Petitioner also suggests that the grantors would have the right to cancel the contracts upon failure of the grantees to pay the "rent" (royalties) stipulated. This contention assumes the very thing that is now the subject of dispute, since it would be sound only if the grantees are lessees and not vendees. There is nothing in the wording of either instrument to sustain the argument. Baird agreed to transfer his "entire interest in the said lease." (R. 317.) Smitherman assigned all of his rights in the lease to the Ohio Oil Company to have and to hold forever. (R. 32.) *Louisiana Oil Refining Corporation* v. *Cozart,* 163 La. 90, and Article 2712, *infra,* p. 35, cited by petitioner, refer only to lessees and hence are not in point.

Under the law of Louisiana and under the law that obtains generally in jurisdictions that apply the criteria of the common law, the instruments executed by Smitherman and Baird must be regarded as assignments and not as leases. Presumably the local law would control in this case.

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[11] Article 2464 states that the price of the sale "ought to consist of a sum of money, otherwise it would be considered as an exchange." It is wholly immaterial in the present case whether there was a sale or an exchange of the property in question, since in either event the ownership of the thing sold or exchanged passed from the vendor to the purchaser.

See *Burnet* v. *Harmel,* decided November 7, 1932 (No. 26, October Term, 1932). But whichever law is to be applied the result is the same, and we submit that the transfers in question effected "a sale or other disposition of property" within the meaning of Section 202 (a) of the Revenue Act of 1921, *infra,* p. 28, and that the Commissioner therefore correctly applied that section in computing the gain derived, without giving the petitioner the allowance for depletion which he now claims.

CONCLUSION

It is respectfully submitted that the decision of the court below was correct and should be affirmed.

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DECEMBER, 1932.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 229, 239, 245:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *
>
> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (10) In the case of mines, oil and gas wells, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: * * * *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further,* That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on

cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, * * *.

Treasury Regulations 62:

ART. 201. *Depletion of mines, oil and gas wells; depreciation of improvements.*—
* * *

* * * * *

(h) Depletion allowance in case of discovery: The deduction for depletion in case of a discovery can not exceed the net income computed without allowance for depletion, from the property upon which the discovery is made, except where and to the extent that such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913. Net income is the gross income from the sale of all mineral products and any other income incidental to the operation of the property for the production of the mineral products, less operating expenses, including depreciation on equipment, and taxes, but excluding any allowance for depletion. If the mineral products are not sold as raw material but are manufactured or converted into a re-

fined product, then the gross income shall be assumed to be equivalent to the market or field price of the raw material before conversion. Operating expenses, depreciation, and taxes on the property upon which the discovery is made, should be applied against the gross income from the same property on the basis of actual expenditures, but if the records for the year 1921 are in any case inadequate, allocation of such expenditures for that year may be made on the basis of the ratio of (1) the number of wells operated on the property on which the discovery is made to (2) the total number of wells operated in the operating division in which the discovery is included.

ART. 203. *Amount returnable through depletion and depreciation deductions in the case of lessee.*—(a) In the case of a lessee, the amount remaining in any year returnable through depletion and depreciation deductions is (1) the value as of the basic date of the lessee's equity in the property plus (2) subsequent allowable capital additions but minus (3) depletion and depreciation sustained, whether legally allowable or not, from the basic date to the taxable year and the residual value of other property at the end of operations. The amount returnable through depletion is the total capital remaining less the sum recoverable through depreciation.

(b) The value of the equities of lessor and lessee shall be computed separately, but, when determined as of the same basic date, shall together never exceed the value at that date of the property in fee simple.

(c) The value of a lessee's equity, if acquired prior to March 1, 1913, is the value of his interest in the mineral as of that date.

(d) The value of a lessee's equity in a proven mineral property acquired on or after March 1, 1913, is its cost.

(e) The value of a lessee's equity in a discovery on or after March 1, 1913, is the fair market value at date of discovery or within 30 days thereafter, of his equity in the mineral discovered.

ART. 204. *Amount returnable through depletion and depreciation in case of lessor.*— (a) In the case of a lessor, the amount remaining in any year returnable through depletion and depreciation deductions is (1) the value of his equity in the property at the basic date minus (2) depletion and depreciation sustained, whether legally allowable or not, from the basic date to the taxable year, plus (3) subsequent allowable capital additions, and minus (4) the value of the land at the basic date for other purposes than mineral production and the residual value of other property at the end of operations. The amount returnable through depletion is the total capital remaining less the sum recoverable through depreciation.

(b) The value of the equities of lessor and lessee shall be computed separately, but, when determined as of the same basic date, shall together never exceed the value at that date of the property in fee simple.

(c) The value of the lessor's equity in the case of a mineral property not under lease on March 1, 1913, but subsequently leased, is the en bloc value of the mineral in the ground on March 1, 1913, and will, in the absence of satisfactory evidence to the contrary, be presumed not to exceed the value as of March 1, 1913, of the royalties to be expected under the lease.

* * * * *

(f) The value of a lessor's equity in a mineral property when acquired on or after March 1, 1913, is its cost.

(g) The value of a lessor's equity in a discovery on or after March 1, 1913, is the fair market value at the date of discovery, or within 30 days thereafter, of his equity in the mineral discovered.

ART. 215. *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the amount remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the amount remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the amount remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received to the extent that such deductions are legally allowable. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition.

ART. 215. [As amended by T. D. 3938 (1926), C. B. V-2, p. 117.] *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount

remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

Merrick's Revised Civil Code of Louisiana, Third Edition:

ART. 2439. *Definition.*—The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price, and the consent.

ART. 2449. *Incorporeal Things Included.*—Not only corporeal objects, such as movables and immovables, livestock and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, the rights, titles and interests to an inheritance or to any parts thereof, a servitude or any other rights. (As amended by Act 126 of 1888, p. 186.)

ART. 2462. *A Promise to Sell,* when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same.

One may purchase the right or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either

party. (As amended and reenacted by Act 27 of 1920.)

ART. 2464. *Price must be Certain and Substantial, and Agreement Serious.*—The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

ART. 2471. *Conditional Sales.*—A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition.

If the thing be destroyed before this happens, the loss is sustained by the seller.

If the thing be only deteriorated, when the condition is accomplished, the buyer has the choice either to take it in the state in which it is, or to dissolve the contract.

If it has undergone any improvement without the agency of the seller, the buyer has the advantage of this improvement, without having to pay any increase of price.

ART. 2669. *Lease or Hire Defined.*—Lease or *hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.

ART. 2670. *Essentials of.*—To the contract of lease, as to that of sale, three things are absolutely necessary, to-wit: the thing, the price, and the consent.

ART. 2671. Id. *The Price* should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.

ART. 2674. *Lease of Things.*—To let out a thing is a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him.

ART. 2712. *Non-Payment of Rent.*—The lessee may be expelled from the property if he fails to pay the rent when it becomes due.

ART. 2725. *Sub-Lease.*—The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted.

The interdiction may be for the whole, or for a part; and this clause is always construed strictly.

ART. 2786. *Resale.*—A thing sold and paid for may be alienated absolutely and unconditionally; but if it be sold with a rent reserved, it remains perpetually subject to the rent, into whatsoever hands it may pass.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 215.—October Term, 1932.

E. G. Palmer, Petitioner,
vs.
Mrs. Agnes McGrawl Bender, Administratrix of the Estate of James G. Bender, late Collector of Internal Revenue for the District of Louisiana.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 9, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner brought suit in the District Court for Western Louisiana to recover taxes alleged to have been illegally exacted for 1921 and 1922 upon income derived from oil properties by petitioner as a member of two partnerships, known respectively as the Smitherman and Baird partnerships. Both partnerships, after 1913, acquired oil and gas leases of unproved Louisiana lands and engaged in drilling operations on them which resulted in discovery of oil on March 30, 1921, in the case of the Smitherman leases and on August 23, 1919, in the case of the Baird leases.

In April, 1921, the Smitherman partnership executed a writing by which it conferred on the Ohio Oil Company the right to take over a part of the leased property on which the producing well was located, subject to the obligations of the covenants of the leases, in consideration of a present payment of a cash bonus, a future payment to be made "out of one-half of the first oil produced and saved" to the extent of $1,000,000, and an additional "excess royalty" of one-eighth of all the oil produced and saved. The instrument in terms stated that the partnership "does sell, assign, set over, transfer and deliver . . . unto the Ohio Oil Company" the described leased premises. The Baird partnership in November, 1921, gave a similar document to the Gulf Refining Company containing some additional features which in the view

we take are immaterial. It too stipulated for future payment of royalties in kind from the oil produced and saved.

Petitioner's tax returns for the years 1921 and 1922 reported his distributive share of the income from the Smitherman partnership, derived from the bonus payment and oil received under its contract with the Ohio Oil Company, and also his share in the income from the Baird partnership from oil received under its contract with the Gulf Refining Company. In the returns for both years petitioner, relying upon the provisions of § 214 (a) (10) of the Revenue Act of 1921, 42 Stat. 239, regulating depletion allowances in the case of oil and gas wells, made a deduction for depletion based on the value of the oil in place in the two properties on the respective dates of discovery.

The Commissioner refused to allow these deductions on the theory that both transactions were sales of the leases by the partnerships and that the only allowable deductions, in calculating taxable gain, are those based upon the cost of the respective properties to petitioner, in each case materially less than their value at the date of the discovery of oil. This resulted in the assessment and payment of an increased tax which is the subject of the present suit. Judgment of the District Court, 49 F. (2d) 316, denying petitioner the right to make the deductions claimed, was affirmed by the Court of Appeals for the Fifth Circuit, 57 F. (2d) 32. This court granted certiorari, — U. S. —.

Both courts below, following earlier decisions of the Court of Appeals with respect to the two instruments involved here, held that they were assignments or sales of the leases for the stipulated consideration of bonus paid and royalties to be received. See *Waller* v. *Commissioner*, 40 F. (2d) 892; *Herold* v. *Commissioner*, 42 F. (2d) 942. The Government rests its case on this conclusion. It concedes that if any reversionary interest, according to the common law, however small, has been retained in the leased land by the two partnerships, the petitioner is entitled to the depletion allowances claimed, but insists that no such interest was reserved by the instruments in question. Petitioner contends that by the Louisiana law any transfer of an interest in land, yielding to the transferor, as consideration, the fruits of the land as they may be produced, such as the royalty oil in the present case, must be regarded as a lease. See *Robertson* v. *Pioneer*

Gas Company, 173 La. 313. From this he concludes that the two instruments were subleases and invokes the rule recently affirmed in No. 80, *Murphy Oil Company* v. *Burnet*, decided December 5, 1932, that the lessor of an oil and gas well is entitled to a depletion allowance upon bonus and royalties received from the lessee, under § 234 (a) (9) of the Revenue Act of 1918. Section 214 (a) (10) of the Revenue Act of 1921, which is applicable here, contains the same provisions.

It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. See No. 26, *Burnet* v. *Harmel*, decided November 7, 1932. We look to the statute itself and to the decisions construing it to ascertain to what interests it is to be applied and then to the particular interests secured to the two partnerships by the instruments in question to ascertain whether they come within the statutory provision. The formal attributes of those instruments or the descriptive terminology which may be applied to them in the local law are both irrelevant.

Sec. 214 (a) (10) of the Act of 1921 so far as now material is printed in the margin.[1] It will be observed that the statute directs that reasonable allowance for depletion be made as a deduction in

[1]Sec. 214. (a) That in computing net income there shall be allowed as deductions:

. . . . . .

(10) In the case of mines, oil and gas wells, . . . a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: . . . *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: . . . such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and the lessee. . . .

computing net taxable income, "in the case of oil and gas wells, . . . according to the peculiar conditions in each case". The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. It is true that under Article 215 of Treasury Regulations 62 the lessor of an oil or gas well is entitled to a depletion allowance upon the bonus and royalties received from the lessee. See *Murphy Oil Company* v. *Burnet, supra.* But there is nothing in the statute or regulations which confines depletion allowances to those who are technically lessors. The concluding sentence of the section that "In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and the lessee" presupposes that the deductions may be allowed in other cases. The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.

That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this Court in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364. There a depletion allowance under § 12 (a) of the 1916 Act, 39 Stat. 767, was claimed by a lessee of a mining lease, in the computation of tax on income from the proceeds of ore mined. The statute made no specific reference to lessees and the Government argued that as the lessee acquired no ownership of the ore until the severance from the soil (see *United States* v. *Biwabik Mining Co.*, 247 U.S. 116, 123) the lease gave him no depletable interest in the ore in place. But this Court held that regardless of the technical ownership of the ore before severance, the taxpayer, by his lease, had acquired legal control of a valuable economic interest in the ore capable of realization as gross income by the exercise of his mining rights under the lease. Depletion was, therefore, allowed.

Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction, he has retained a

right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. See *Burnet* v. *Harmel, supra;* No. 104, *Bankers Pocahontas Coal Company* v. *Burnet,* decided December 5, 1932.

In the present case the two partnerships acquired, by the leases to them, complete legal control of the oil in place. Even though legal ownership of it, in a technical sense, remained in their lessor, they, as lessees, nevertheless acquired an economic interest in it which represented their capital investment and was subject to depletion under the statute. *Lynch* v. *Halworth-Stephens Co., supra.* When the two lessees transferred their operating rights to the two oil companies, whether they became technical sublessors or not, they retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor. *Burnet* v. *Harmel; Bankers Pocahontas Coal Company* v. *Burnet, supra.* Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case.

The statute makes effective the legislative policy, favoring the discoverer of oil, by valuing his capital investment for purposes of depletion at the date of the discovery rather than at its original cost. The benefit of it accrues to the discoverer if he operates the well as owner or lessee, or if he leases it to another. It would be an anomaly if that policy were to be defeated and all benefit of the depletion allowance withheld because he chose to secure the return

of his capital investment by stipulating for a share of the oil produced from the discovered well through operation by another.

The bonus received by the Smitherman partnership was a return *pro tanto* of the petitioner's capital investment in the oil, in anticipation of its extraction, resulting in a corresponding diminution in the unit depletion allowance upon the royalty oil as produced. Compare *Murphy Oil Co.* v. *Burnet, supra.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.